

A STUDY OF THE EVOLUTION OF IJTIHĀD (LEGAL REASONING)  
IN THE DEVELOPMENT OF THE ZAKĀT LAW  
DURING THE 1ST CENTURY A.H.

BY

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IN THE NAME OF GOD, THE BENIFICENT, THE MERCIFUL



Preface and Acknowledgment

This study is the result of more than three years of sustained research (from February 1978 to March 1981) in which there was hardly any distraction except for the family responsibilities. The expenditure of such a considerable time is understandable in view of the vastness and highly involved nature of the subject. For in order to arrive at one's own judgement on the questions which this work attempts to investigate, a great deal of careful reading and reflection was required. In addition there was the problem of presenting abstract and delicate ideas in a foreign language. This was particularly the case for a person who did not acquire his early education at any institution where English was the medium of instruction. While it would be preposterous on this writer's part to consider the conclusions of his research to be the revelations of absolute truth, it is hoped that they are correct in their broad essentials and deserve serious consideration.

It seems essential to express my gratitude to all those who have stimulated my interest in this field of study and helped me in one way or other. The first name that comes to my mind is that of my supervisor, Dr. I.K.A. Howard. He not only gave me his valuable time advising and directing the research but he also showed great patience, consideration and tolerance throughout the period of my contact with him and played no minor role in keeping my spirits up. Besides constantly goading me to finish my research, it is through his kindness and encouragement that I have been able to complete this work at Edinburgh. To this

gentleman I am profoundly grateful. A special debt of gratitude is owed to some of my friends from whom I received assistance and cooperation in different ways during the course of my work. Dr. Mujāhid Kamrān (who at that time was a postgraduate student in the department of Physics in Edinburgh) was kind enough to go through the initial draft of the first chapter and suggested many grammatical corrections. Mrs. Dā'ūd Pota, the learned mother of my friend Dr. Isa Dā'ūd Pota (formerly a teaching member of Edinburgh University) checked the draft of the second chapter and offered several valuable suggestions on the style of language. Mr. Khaldī Kamel, a postgraduate student in Applied Linguistics, translated for me an article from French into English. To all of them I am deeply thankful. I also enjoyed courteous assistance from the staff of the Edinburgh University Library. It was in fact a study room of this library where a major part of the following thesis was written down. I specially acknowledge the help which was provided to me from the inter-library loan department of this library. Had the excellent facility of this department and the enthusiastic co-operation of its staff not been available to me, it would have been exceedingly difficult to complete this work at Edinburgh. The other names in this regard which come to my mind are of Maulānā Ṭāsīn, the librarian of Majlis 'Ilmī who kindly allowed me to take a xerox copy of a rare book, the published volume of Musannaf Ibn Abī Shayba and of my friend Mr. Saeed al-Rahman who made the xerox copy and sent it to me from Pakistan. My thanks are also due to Miss I. Crawford, the Secretary of the Department of Middle Eastern Studies for her general help throughout the period of my stay in Edinburgh.

Last but not least is the debt of gratitude I owe to my wife who suffered my bookishness with her characteristic grace and sweetness and to my children who kept my life pleasant and cheerful throughout.

This study was made possible firstly by the study leave granted by the University of Karachi where this writer is employed as lecturer and secondly by a state bursary awarded to me by the government of Pakistan.

Finally a few words about some of the technical aspects of this thesis. First of all this writer has tried to follow the system of transliteration adopted by the department of Islamic and Middle Eastern Studies, University of Edinburgh. The table embodying this system is given on p. xiv. Secondly the names of most of those works which are frequently referred to in footnotes have been abbreviated while the full names of other references have been used, are mentioned in full. The table of abbreviations is given on p. xii.

It seems necessary to point out in connection with the names of important Islamic personalities, that this writer is accustomed to pronouncing with the Prophet Muhammad and the other prophets, the formula which is usually rendered into English as "peace be on him" and with the Companions the formulae: "God be pleased with them" and "God have mercy on them" in respect of other venerable personalities. It was extremely difficult, beside being jarring, to include all these formulae in the text of the thesis for they would have sometimes occurred several times on a page. These formulae may, therefore, be considered

as understood.

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This writer who both as a student and as a Muslim feels inclined to round off this preface by expressing his profound consciousness of man's limitation in his quest for truth and knowledge - unless aided by God - by repeating the sentence with which the writing of classical Muslim scholars are concluded: This work is brought to completion only by the grace of God and He better knows what is true.

M.A.S.S.

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Abstract

The gradual evolution of zakāt law during the 23 years of the prophetic life of Muḥammad positively reflects a major and effective role of ijtihād in the formulation and evolution of the detailed regulations of the law. Beside the Qur'ān which was in fact a binding and normative source for the ijtihādic activity of the Prophet, his own personal judgement and wisdom constituted the second major source in this regard. Consultation with the Companions and the selective adaption of the ancient Arab traditions/legal customs as well as those of Ahl al-Kitāb might be considered as the secondary sources of subjective nature.

Whereas the interpretation of the relevant Qur'ānic texts, the formulation of the applicative details, deduction and derivation from the general explicit rules in the Qur'ānic texts were the major parts of the ijtihādic methodology of the Prophet, the new legislation and the selective adaption from the above mentioned secondary sources can not be denied altogether. Moreover, certain guiding principles which were presumably followed in the process of ijtihād during the Prophet's time can be deduced.

After the Prophet, the changing conditions of the time of the Older Companions (10 A.H. to 35 A.H.) demanded not only the systematization of implementative details of the law and legal solutions to new problems, but a need of some addition and alterations in the old law was also felt. In all these spheres certain ijtihādic/legislative steps, on the part of the older Companions can be proved. Beside the authoritative sources,

namely the Qur'ān and the practices of the Prophet's time, the major sources for the ijtihādīc activity of the Companions were their individual reasonings and mutual consultation. The criteria of preference and acceptance of the proposals on the eve of mutual consultation, however, seems to be gradually moved towards argumentation and rationalisation instead of seeking a final approval by a central authority.

During the period of the Younger Companions (35 A.H. to 73 A.H.) which was generally a time of internal conflicts and civil riots, the ijtihādīc/legislative activity appears to have been increasingly shattered. Mutual consultation over ijtihādīc issues and the central leadership of Caliph in this regard could not be retained at all. This, as well as several other factors, eventually resulted in a shift of control over the ijtihādīc activity from the hands of the government to the private jurists. Hence different and sometimes contradictory fatawā on the part of the individual jurists began to be issued and practised in different regions. Whereas the Qur'ān, the laws of the Prophet's time and the relevant statements of the Prophet were given a status of the coercive and authoritative sources, the precedents of the period of the Older Companions as well as individual reasoning was held as a major source for the ijtihādīc activities of private jurists. The last mentioned, i.e. individual reasoning, however, gradually lost its value against a growing trend of respect for early precedents.

During the time of the Successor Jurists (73 A.H. to 101 A.H.) while the political conditions had been improved and a specific system of government had been established, ijtihādīc

activity as compared to the preceding time appears to have flourished. Its control, however, could not be regained by the government throughout the period until the time of 'Umar b. 'Abd al-'Azīz. Only in his brief reign (99 A.H. to 101 A.H.) can an effective involvement of the government on the ijtihādīc /juristic activity be proved. A specific development of the Successor's time as a whole was a growing trend among the jurists towards evolving and formulising the general principles and technical theories for the law and to apply them in the derivative details. Whereas this trend refined and systematized the process of expansion making the law more uniform and balanced in all its derivative details, the same trend was also responsible for creating some technical complexities in the law. The ijtihādīc activity pertaining to zakāt law, during the Successor's time as a whole, reflects the use of qiyās (though in its rudimentary form), the observation of maṣlaḥa and consideration of general principles of justice.

List of Abbreviations

A. Dā'ūd	-	Abū Dā'ūd, <u>Sunan</u>
<u>Amw.</u>	-	Abū 'Ubayd, <u>Kitāb al-Amwāl</u>
<u>Ath.Sh.</u>	-	Abū Ḥanīfa, <u>Kitāb al-Āthār</u> version of al-Shaybānī
<u>Ath.Y.</u>	-	Abū Ḥanīfa, <u>Kitāb al-Āthār</u> version of Abū Yūsuf
Bukh.	-	al-Bukhārī, <u>al-Jām'ī al-Sahīh</u>
I. Hish.	-	Ibn Hishām, <u>Sīrat Rasūl Allah</u>
I. Maj.	-	Ibn Māja, <u>Sunan</u>
I. Sa'd	-	Ibn Sa'd, <u>al-Ṭabaqāt al-Kubrā</u>
<u>Khi.Q.</u>	-	al-Qurashī, <u>Kitāb al-Kharāj</u>
<u>Khi.Y.</u>	-	Abū Yūsuf, <u>Kitāb al-Kharāj</u>
Maj.	-	Zayd b. 'Alī, <u>al-Majmū'</u>
<u>Mus.H.</u>	-	Aḥmad b. Ḥanbal, <u>Musnad</u>
<u>Mus.Sh.</u>	-	Ibn Abi Shayba, Abū Bakr, <u>al-Musannaf</u>
<u>Musl.</u>	-	Muslim b. al-Ḥajjāj, <u>al-Sahīh</u>
Muw.Sh.	-	Mālik b. 'Anas, <u>al-Muwatta'</u> version of al-Shaybānī
<u>Muw.Y.</u>	-	Mālik b. 'Anas, <u>al-Muwatta'</u> version of Yahyā
Nas.	-	Nasā'ī, <u>al-Sunan</u>
<u>Orig.</u>	-	Schacht, Joseph, <u>The Origins of Muḥammadan Jurisprudence</u>
Q.	-	<u>al-Qur'an</u> (after Q. first figure shows the number of <u>sūra</u> and second shows the verse. Example: Q. 2:31.

San.	-	al-Ṣan'ānī, <u>al-Muṣannaf</u>
<u>Tab.</u>	-	al-Ṭabarī, <u>Tārīkh</u>
<u>Taf.</u>	-	Maudūdī, <u>Tafhīm al-Qur'ān</u>
Tay.	-	al-Ṭayālīsī, <u>al-Musnad</u>
Tir.	-	al-Tirmidhī, <u>Sunan</u>
<u>Umm.</u>	-	al-Shāfi'ī, <u>al-Umm</u>
Wah.	-	al-Wāhidī, <u>Asbāb al-Nuzūl</u>

# Transliteration Table

## Consonants

ء	'	ح	h (omitted at the end of the word)
ب	b	ي	y
ت	t	ال	al
ث	th		
ج	j		
ح	h		
خ	kh		
د	d		
ذ	dh		
ر	r		
ز	z		
س	s		
ش	sh		
ص	s		
ض	ḍ		
ط	t		
ظ	z		
ع	'		
غ	gh		
ف	f		
ق	q		
ك	k		
ل	l		
م	m		
ن	n		
و	w		

## Vowels

Long:	ي	ā
	آ	
	ا	
	اد	ū
	اي	ī
Short:	ا	a
	و	u
	ي	i

omitted at the  
end of the word

## Doubled:

ي	iyy
و	uww

## Diphthongs:

او	aw
اي	ay

## INTRODUCTION

### I

The whole phenomenon of Islamic Law and jurisprudence, in its basic formation and composition, has two major components, namely that which is believed to have been revealed from God and that which is assumed not to have been revealed. As the first component was believed to have been handed down to man ready-made, it was only to be passively received and applied. On the other hand, the second component, which was not ready-made, was, in fact, to be constructed. Hence the second component must always be regarded as subject to human involvement. This human involvement might take place in the form of interpreting and applying the revealed instruction or in the form of deducing new rules from the revealed component. Furthermore, the possibility was always implicit in it of evolving some absolutely new laws and regulations but always within the limits of not contradicting the general spirit of the revealed component as a whole. This human involvement is termed in the present study ijtihād,<sup>1</sup> one

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1. The verbal noun ijtihād is derived from its root J.h.d. This root and all its derivatives contain in their meaning a sense of self exertion or endeavour in carrying out a certain unusual work. (for different use of the word see al-Sihāh, Lisān al-‘Arab, al-Qāmūs al-Muḥīt and Mukhtār).

In the standard metaphor of Usūliyyīn (experts in the science of Usūl al-Fiqh) the term ijtihād is generally referred to the endeavour of a jurist to derive or formulate a rule of law (ḥukm) on the basis of an evidence (dalīl), found in the sources. (See for the standard definitions; al-Ghazālī, al-Mustasfā, vol.II, p.350; al- Āmidī, al- Ahkām, vol.III, p.139 and vol.IV, p.218; Ibn al-Ḥāḥib, vol.II, p.289).



of the basic instruments of law-making in the Islamic legal philosophy.

The present study aims at investigating how this ijtihād was evolved and later developed into its different shapes and modes during the first century A.H. However, this study is limited only to the purview of the development of the zakāt law. For this purpose an attempt is made first to portray a positive picture of the development of zakāt laws during the proposed period. This attempt is based solely on a critical study and evaluation of the earliest available material in this regard, which is derived from the sources, most of which were compiled during the second century A.H. We have been very reluctant to regard as primary any evidence from later sources. We have even avoided the six famous works of traditions, (al-Sihāh al-Sitta), which were compiled as early as during the third century A.H. These sources, however, have been used for the purpose of secondary references.

In tracing the development of zakāt laws, special attention was given to the role being played by ijtihād in the process of law-making and legal development in general. After having formed a picture of the development of zakāt laws during the proposed period, the question of what were the things that would have been taken as the substantive sources for the ijtihād activities pertaining to the zakāt laws and what was the methodology and general principles which might have been followed by the early jurists during the course of their ijtihād are specifically dealt with, and certain conclusions are drawn in this regard.

The reason the law of zakāt was chosen as a basis for investigation of ijtihādīc evolution in the first century A.H., was that there was not only sufficient material in this area available in the very early sources but that also the development of this law could be more cautiously viewed and examined within the context of the other historical developments and the socio-political environment of the period. The enforcement of this law, contrary to the other purely religious phenomena such as ṣalāt (prayer), ṣawm (fast) and ḥajj (pilgrimage), closely involved the institution of government and required a system of collection and the implementation of certain rules and regulations. Therefore, the mass of narrations and reports which we find relating to zakāt in the early corpora of traditions and jurisprudence, could be more critically judged and evaluated by using the general practical developments of that time as a yardstick. Hence the results so achieved are hoped to possess relatively higher chances of being accurate. However, we must mention here that zakāt law, being outside the function of qadā (judiciary), lacked a very important aspect of ijtihādīc/legal development during the period under discussion. In our view, the ijtihādīc development of some other laws such as ‘uqūbāt (criminal laws) and mu‘āmalāt (civil laws) also needs to be investigated using the same methods which we have adopted in this study. Only then will it be possible to obtain a more complete and clearer picture of the whole ijtihādīc/legal development during the first century A.H., a period which to cite Schacht is the most important but most obscure period of the history of Islamic law.<sup>1</sup>

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1. Schacht, Joseph. An Introduction to Islamic Law (Oxford 1966), p.15.

This attempt, however, is aimed at working out a method of research and investigation in the field and it is hoped that the present study will be regarded as the first example, demonstrating the feasibility of this approach.

## II

Our primary sources for the following study were as follows:

1. al-Qur'ān; the oldest in our primary sources. This book according to Muslim belief had been revealed to the Prophet in the form of short and long addresses from God. Their texts were conveyed to the Prophet through the divine means in a piecemeal order according to time and situation. When and at what time exactly <sup>were</sup> these texts revealed and presented by the Prophet before the people? In this regard we have detailed reports, mentioned in the compilations of traditions, history and Qur'ānic interpretation. Although these reports should not be taken as a basis of certain knowledge, however, they definitely provide a strong basis for further investigation and study and a critical analysis of these reports in the perspective of the other historical developments would provide some positive results in this regard. Apart from these reports the internal contents of the Qur'ānic Sūras (chapters) and their internal evidences lead us to speculate on the time and situation in which these sūras might have been presented before the people

of the Prophet's time.<sup>1</sup> Therefore in order to determine the early basic concept of zakāt and the gradual stages of its development during the Prophet's time, we have taken the Qur'ān as a first primary source and only a secondary status is given to the corpora traditions and history which were compiled later.

2. Kitāb al-Āthār; this corpus of legal ahādīth (traditions) and āthār (reports), originally compiled by Abū Ḥanīfa (d. 150 A.H.), is the second earliest available source after the Qur'ān, for no earlier source has been discovered so far. This book has been generally attributed to Abū Yūsuf (d. 182) and Shaybānī (d. 189), two students of Abū Ḥanīfa, and has already been published as attributed to them separately. Nevertheless, both of these two must be regarded as the two different versions of one original book, namely Kitāb al-Āthār, compiled by Abū Ḥanīfa. This assertion is not only based on a comparative study which shows that apart from a few additions and omissions in each version, the contents of both of the books are exactly the same or similar in most cases, but on the other hand, the name of Abū Ḥanīfa's own work as Kitāb al-Āthār is often found in the early biographical works such as Ibn Mākūlā (d. 475 A.H.),<sup>2</sup>

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1. Besides scrutinising the relevant reports, postulating the approximate time of the different revelations of the Qur'ān on the grounds of their internal contents is a method that has already been used by Abū al-Ā'ālā Maudūdī (d. 1399/1979) in his work Tafhīm al-Qur'ān 6 vols., (Lahore, 1949-74). See his prefaces to the different surās of the Qur'ān.
  2. Ibn Mākūlā, al-Ikmāl (Beirut, 1962), vol.III, p.39.

Sam'ānī<sup>1</sup> (d. 562), al-Qurashī (d. 775)<sup>2</sup> and 'Asqalānī (d. 852)<sup>3</sup>.

This name as the work of Abū Ḥanīfa can also be traced from many other early works such as Ma'rifaṭ 'Ulūm al-Ḥadīth of Ḥākim

Nīshābūrī (d. 405)<sup>4</sup> and al-Badā'i' wa'l-ṣanā'i' of Kāsānī (d. 587).<sup>5</sup>

Moreover, apart from the above two versions of the book, the existence of the following four versions until a certain late time has also been proved by Nu'mānī in his work Ibn Māja awr 'ilm al-Ḥadīth (Karachi 1376/1956)<sup>6</sup>.

1. Version of Zufar b. al-Hudhayl al-Ju'fī (d. 158).
2. Version of Ḥasan b. Ziyād Lu'lu'ī (d. 204)
3. Ḥammād b. 'Abī Ḥanīfa (d. 170)
4. Abū Yahya Muḥammad b. Khālīd Wahbī (d. before 190 A.H.)

In the present study, we have consulted the two available published versions of Abū Yūsuf and Shaybānī. These books contain Prophetic statements on legal issues and the legal solutions propounded by Companions and Successor jurists in general. However, the special importance of these books lies

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1. Sam'ānī, Kitāb al-Ansāb (Hyderabad, n.d.) p.284.
  2. Qurashī, al-Jawāhir al-Mudīya fī Tabaqāt al-Ḥanafīyya, 2 vols., (Hyderabad, 1332); see the section Ahmad b. Bakr.
  3. 'Asqalānī: Lisān al-Mīzān; see the section Muḥammad b. Ibrāhīm Jaysh al-Baghawī.
  4. Ma'rifa 'Ulūm al-ḥadīth Cairo, 1337 A.H. p.164.
  5. P.220.
  6. See pp.172-76.

in the fact that a major part of the contents consist of the fatawā of Ibrāhīm Nakha'ī (d. 95 A.H.), an eminent jurist of Kufa.<sup>1</sup> Hence this book provides first hand and relatively more reliable information about the early legal development, particularly during the second half of the first century.

3. Muwatta'; this well-known compilation of Mālik has been the third primary source of the present study. The two published versions of this book, i.e. by Shaybanī (d. 189) and by Yahyā (d. 234) have been consulted and referred to in the present work.

4. Kitāb al-Kharāj of Abū Yūsuf (d. 182).

5. Kitāb al-Kharāj of Yahyā b. Ādam al-Qurashī (d. 203).

The main subject of both of the above two books is kharāj, a secular tax. However, some information about zakāt and 'ushr are occasionally mentioned. In view of the fact that these books belong to a very early period, they have been included in the primary sources of this study.

6. Musnad of Abū Dā'ūd al-Ṭayālīsī (d. 204 A.H.).

It is assumed that this is the earliest musnad, a particular

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1. Out of the 549 reports from Successors in the Kitāb al-Āthār of Abū Yūsuf, and the 550 in the Kitāb al Āthār of Shaybanī, not less than 443 and 472 respectively are from Ibrāhīm himself and a further 15 and 11 respectively are related through Ibrāhīm from other Successors. (See Orig., p.33).

type of compilation in which ahādīth are arranged in order of their reporters.<sup>1</sup>

7. Al-Umm of al-Shāfi'ī (d. 204 A.H.).

Although this work mainly aims at presenting the juristic/legal opinion of al-Shāfi'ī himself, a considerable amount of the reports through the chain of al-Shāfi'ī about the early authorities can also be found in this voluminous work. Similarly, a few traditions of the Prophet regarding the zakāt law as well as other branches of law can also be found in another work of al-Shāfi'ī, namely al-Risāla. Both of these works are consulted during the following study.

8. Al-Musannaf of 'Abd al-Razzāq al-Ṣan'ānī (d. 211 A.H.)

This book has been recently published in 11 volumes with editing by Ḥabīb al-Rahmān al-Ā'zamī. This book has never been consulted so far in any work of legal history. Therefore it definitely provides a great deal of new material on the subject. The special importance of the book, in our view, is its often mentioning of the names Ibn Jurayj (d. 150 A.H.), Ma'mar b. Rāshid (d. 153 A.H.), Awza'ī (d. 157 A.H.), Sufyān al-Thawrī (d. 160 A.H.) and Layth b. Sa'd (d. 175 A.H.). All of them were among the contemporaries of Abū Ḥanīfa and Mālik.

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1. For the names of the early compilations of ahādīth on the pattern of musnad, see 'Umāri, Buḥūth fī Tārīkh al-Sunna al-Musharrafa (Beirut, 1395/1975), pp.230-33.



These persons in their times had, reportedly, compiled their own books of traditions.<sup>1</sup> However, none of these compilations, according to our present knowledge, has been preserved until today except the last four volumes of Ma'mar Rāshid's work, which are in manuscript form in Turkey.<sup>2</sup> It can be speculated, however, that the major part of the above mentioned works probably would have been copied by Ṣan'ānī as a considerable number of reports are mentioned with the reference of their names in his bulky compilation of al-Musannaf. This point, however, needs further investigation, if it can be proved, then we have a mass of relatively more authentic and reliable information and material, that belonged to a very early period.

In view of the above considerations, we have especially emphasised this work and often referred to it in the present study.

9. Kitāb al-amwāl of Abū 'Ubayd (d. 224 A.H.)

10. Al-Musannaf of Abū Bakr b. Abī Shaybā (d. 235 A.H.)

This work consists of 15 volumes, but only the first, second and fourth volume have so far been published.<sup>3</sup> Fortunately,

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1. Ibid., pp.228-29.

2. Ibid., p.228,

3. The manuscript copies of the book are found in Kutub Khāna Sa'īdiya, Hyderabad (India) and in a library at Istanbul. (See Nu'mānī, Ibn Māja, p.50). The publication of the above referred three volumes was carried out by a private effort of 'Abd al-Tawwāb Multānī at Multān (Pakistan) before 1947, and could not be completed due to his death. The printing of the already published vols. is also very unsatisfactory.



the published fourth volume contains a chapter on zakāt and has been consulted in the present study.

11. Musnad of Aḥmad b. Ḥanbal (d. 241 A.H.)

12. Al-Majmū', attributed to Zayd b. 'Alī (d. 121 A.H.).

The attribution of this book to its author has been regarded as doubtful by some scholars. Abū Zahra, in his work, al-Imām Zayd bayātuhu wa-'asruhu 'arā'uhu wa-fighuhu (Cairo 1959), has discussed it in detail and concluded that its attribution to Zayd b. 'Alī seems to be genuine, but only in the sense that the contents of the books, viz., aḥādīth of 'Alī and his own opinions were delivered by him orally and transmitted to his successors the same way until a later time when it was preserved in the written form and was named as al-Majmū'.<sup>1</sup> The book was also consulted during the study, however its reference is seldom given only in the case of 'Alī's ijtihādāt. None of the main conclusion of this study is based on the material of al-Majmū'.

### III

As this research would form a part of the studies related to the field of the early history of Islamic law, it seems

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1. For details of his arguments in this regard see pp.233-74 of his above referred book.

appropriate to make a general survey of the research carried out in the field.

If we can expand the scope of the field to the extent of the first three centuries of Islam, we find that this wide field has stimulated the curiosity of a considerable number of scholars during the last hundred years.

Among the Europeans, Von Kremer and E. Sachau were perhaps the first persons who stepped into the field. Their researches<sup>1</sup> had already been published during the last century.<sup>2</sup> In order to trace the early development of Islamic law, both of them perhaps centred their attention on the ... the dissensions between hadīth and ra'y, two conflicting trends of the Muslim jurists during the second century A.H.<sup>3</sup> The later mentioned scholar was inclined to think that the terms ahl al-hadīth and ahl al-ra'y were originally used to indicate two different branches of religious scholars. Ahl al-hadīth were concerned with the study of transmitted sources, and ahl-al-ra'y with the practical aspects of the law. In the later time these words gradually developed as terms, indicating a contrast between ... methods of legal deduction, a contrast which was quite common already in the second century.<sup>4</sup>

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1. Von Kremer, Alfred, Kulturgegeschichte des Orients unter den Chalifen. 2 Bde. Wien, 1875-77. Sachau Eduard. Zur ältesten Geschichte des Muhammadanischen Rechts. Akademie der Wissenschaften, Wien. Philosophisch-historisch Klasse. Sitzungsberichte. Bd. 65 (1870), 669-723.
  2. This writer's access to the contents of these works was only possible through the work of Goldziher, The Zāhirīs, their doctrine and their history (Leiden, 1971).
  3. Goldziher, Zahirīs, 4.
  4. Ibid.

The next important scholar, who stepped into the field after Sachau, was Ignaz Goldziher, one of the most erudite and brilliant scholars in the Orientalist traditions of scholarship. His Die Zahiriten, ihr Lehrsystem und ihre Geschichte had already been published in 1884. Undoubtedly this work represents pioneering research on the Zāhirī school of jurisprudence. However, as the foundation of this school is attributed to Dā'ūd b. 'Alī b. Khalf al-Zāhirī (d. 270 A.H.) the real purview of his research starts with the advent of the third century. Nevertheless, tracing the historical background that had given birth to the Zāhirī school, he also dealt with some important aspects of the early legal development and devoted the first two and a half chapters of his book to this purpose. He, in fact, established and developed the above-mentioned theory of Sachau and attempted to view the whole legal development of the earliest time through the particular angle of the contrast between ra'y and hadīth. Hence he concludes that the madhāhib al-fiqh (schools of jurisprudence) differed from each other even in their earliest stages of their evolution on what extent they permit ra'y to be a determining factor in establishing an Islamic rule in a given case. Abū Ḥanīfa and Dā'ūd b. 'Alī b. Khalf al-Zāhirī, in his view, were the two opposite extremes in this respect. The former had allowed the exercise of ra'y to a wide extent, while the latter, at least according to his early teaching, had absolutely refuted any justification of ra'y. Mālik b. Anas (d. 179 A.H.), al-Shāfi'ī (d. 204 A.H.) and Aḥmad b. Ḥanbal (d. 241 A.H.) have taken the position between these two, not just chronologically but also with respect to their

recognition of ra'y. In order to trace the origin of application of ra'y in Islamic jurisprudence, he, quoting the well-known phrase of al-Shahīd al-Ṣafī "al-Nusūs 'idhā kānat mutanāhiya wa al-waqā'i' ghayr mutanāhiya wa mā lā yatanāhi lā yadbituhu mā yatnāhi", was inclined to think that the existing transmitted sources were not complete and offered only occasional solutions which, however, were insufficient for all legal problems even for the country in which they originated. This problem imposed the obligation on practising legists of considering themselves competent to exercise their subjective good sense, their insight, in the spirit of the existing material and in agreement with them, as legitimate instance for concrete cases for which the transmitted law provided no solution. The need for extending the legal bases was so deeply felt that even stern advocates of traditions, unwillingly but under the pressure of realities, had to admit the application of ra'y. However, according to him, it appeared in the form that, in order to have ready for every concrete case a judgement from the traditions, they often did not require the attestation of the tradition if it was a question of supplying an authority from the traditions for a legal decision. He supports this assertion by arguing that Abū Dā'ūd included the weakest tradition in his Sunan in the places where he could not find any better attested tradition for a certain legal paragraph. He goes on to say that many a fabrication of traditions might have its origin in this fundamental endeavour to shun ra'y, even ostensibly, yet these fabricated quotations from the traditions were nothing but ra'y clothed in tradition. According to Goldziher, the application

of ra'y in Islamic jurisprudence, in the later period, developed in the logical form of qiyās (analogy), which put a formal limit to the indiscriminate application of ra'y. However, he goes on to conclude that the introduction of istiḥsān among Ḥanafī school cancelled this effect in favour of uncontrolled ra'y.

When and at what time exactly the above mentioned legal sources (ra'y, qiyās and istiḥsān) were introduced and to what extent had the usage of these sources for decision developed in Abū Ḥanīfa's time? Moreover, how did Abū Ḥanīfa himself utilise the speculative components of legal deduction, and what degree of justification did he permit them beside the traditional legal sources? These and similar questions had been formed by Goldziher, but, he explained that in view of the dearth of non-partisan sources for the history of earliest development of Islamic jurisprudence, the answers to these questions were difficult to determine precisely. However, he goes on to deduce two conclusions in this regard.

(i) Speculative jurisprudence, which acknowledges no dominant importance to the traditional source material, reached its apex even before Abū Ḥanīfa's time.

(ii) Abū Ḥanīfa, after these preparatory works made the first attempt to codify Islamic jurisprudence on the basis of qiyās. Because a systematic presentation of Islamic jurisprudence, built on the basis of analogy, had become feasible at such a time and it was only from this time on, that a systematic opposition to the principle of qiyās became possible. Therefore,

he concludes, that the above mentioned scholarly achievement of Abū Ḥanīfa only received a very poor reception from his conservative contemporaries. Abū Ḥanīfa's method of qiyās which was showing an indication towards not being content with establishing, treating and applying the existing transmitted materials, but to go beyond this and to follow up all the real and casuistically imaginable requirements of legal practice was given the special name fiqh in contradiction to 'ilm al-hadīth to which his opponents strongly adhered. After having presented Abū Ḥanīfa as the upholder of ra'y, qiyās, ta'līl and istihsān in the second chapter, Goldziher, in the third chapter of his book goes on to show al-Shāfi'ī as a distinguished personality who emerges under the strong impetus of the trends of hadīth in contrast with qiyās. However, he explains that until the time of al-Shāfi'ī, on account of Abū Ḥanīfa's endeavours, on the one hand, but more so because of the force of circumstances qiyās had become a factor in jurisprudence which could no longer be eliminated from the legal sources. Therefore, he concludes that what al-Shāfi'ī could do and actually did was to bring discipline to the application of newly introduced sources without curtailing the prerogative of scripture and traditions and to restrict its free arbitrary application by means of methodological laws with respect to its usage. Hence the science of usūl al-fiqh was formulated which is generally assumed as having been founded by al-Shāfi'ī himself. After having explained the position of al-Shāfi'ī, Goldziher comes directly to Dā'ūd b. 'Alī b. Khalf al-Zāhiri whose school of jurisprudence is the main subject of his book. He considers him as the exponent of *literalists*

~~among~~ al-Shāfi'ī's followers, who not only adhered to hadīth rigidly but also refuted any justification for ra'y as a legal source.<sup>1</sup>

Here it is necessary to mention that the above seemingly sound picture of early development of Islamic jurisprudence which is portrayed by Goldziher in his book appears to have been based only on evidence derived from the very later sources, for the author does not refer to the earlier sources. Probably the earlier sources would not have been easily available to him in his time. Therefore it is difficult to refute the possibility that Goldziher himself through this study might have been affected, even unconsciously, by the later partisan sources which generally have a tendency to show Abū Ḥanīfa, not only as an exponent of ra'y and qiyās, but going beyond that, these sources accused him of being ignorant in the field of hadīth. However, this does not detract from the fact that the above explanation of Goldziher regarding the attitude of ahl al-ra'y and ahl al-hadīth in their formative period remained until the time of J. Schacht as one of the most illuminating statements on the subject.

Apart from the above mentioned book, the second important work of Goldziher which can be considered as indirectly related to our field is the second volume of his Muhammedanische Studien (published in 1890 A.D.). This volume contains a critical study

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1. For details, see I. Goldziher, Die Zāhiriten, (Leipzig, 1884), pp.3-28. English translation of the book by Wolfgang Behn, The Zahiris (Leiden, 1971), pp.3-27.



of traditions from the Prophet. With regard to them, Goldziher arrived at the conclusion that they represent various stages in the growth of Islamic doctrines and it is in this that their utility lay. He denied, however, the claim that they generally went as far back as they professed to, viz., the time of the Prophet. The attribution of doctrines to the Prophet, Goldziher pointed out, was the standard means whereby a doctrine attained its binding character and it was for this reason that the name of the Prophet was invoked. This thesis of Goldziher that ahādīth were projected back to the Prophet has generally been accepted by Western scholars. His discovery, to cite Schacht "became the cornerstone of all serious investigations of early Muhammadan law and jurisprudence, even if later authors while accepting Goldziher's method in principle in their natural desire for positive results, were inclined to minimize it in practice".<sup>1</sup> Margoliouth, Hurgronje, Lammens, Guillaume, and Wensinck all subscribe to this view and have tried to apply it in their investigations.<sup>2</sup>

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1. Orig., 4.

2. As regards to the early development of Islamic law and jurisprudence, the contribution of these authors was only nominal. One major trend, however, was developed by Margoliouth and Lammens - that the concept of Sunna during the early period of Islam was fundamentally different from the concept of Sunna in the classical Islamic usage. These works are to be discussed below on pp.19-20. The above idea was later followed by Schacht and further developed in his Origin. See below pp.20-1. A few works of Hurgronje are also referred to below on pp.18-9. For Guillaume and Wensinck, see their works respectively The Traditions of Islam (Oxford 1924 A.D.) and A Handbook of Early Muhammadan Traditions (Leiden, 1927).



After Goldziher, the scholars whose works can be regarded as partly related to our field are D.B. Macdonald, C. <sup>Snouck</sup> Hurgronje, D.S. Margoliouth, and H. Lammens. They in their general or particular works have implicitly discussed a few points that are related to the early history of Islamic law. However, as far as our field is concerned, their works in general have not made any significant contribution to the then existing fund of knowledge.

D.B. Macdonald in his book, The Development of Muslim Theology, Jurisprudence and Constitutional Theory (Hartford, 1902. <sup>1</sup>), gives an account of the development of Muslim law and jurisprudence. However, he, having covered a very wide period which starts from the Prophet's time up till now, only sketched a general picture of this development and has absolutely avoided referring to any source at all. However, this does not veil the importance of the book which perhaps provided some hypotheses for future researches and investigations.

C.S. Hurgronje, in several articles, has dealt with various aspects of Islamic law, viz., "the nature of Islamic law", "the foundations of Islamic law" and "the Islamic law and custom".<sup>1</sup> In these studies he has occasionally given a brief account of the early history of Islamic law as well. However, it appears that in this respect he only followed his predecessors and probably aimed at revealing the state of scholarship in the

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1. See Selected Work of C. Snouck Hurgronje, ed. in English and in French by G.H. Bosquet and J. Schacht (Leiden, 1957).

field at his time. Nevertheless, his article "la Zakat"<sup>1</sup> possesses an exceptional significance, for in this article he attempted to investigate the early development of zakāt law. The special significance of this article lies in the fact that, in order to determine various stages of the development of zakāt during the Prophet's time, he studied the chronological use of the words zakāt and ṣadaqa in the Qur'ān. The same method, having been amended and improved has also been applied in the first chapters of the present study.<sup>2</sup> However, our results, as will become obvious, are quite different.

D.S. Margoliouth's book "The Early Development of Muhammadanism" (London, 1914) as compared to the works of the first two scholars is relatively nearer to our field. In this book, which is in fact a compilation of his lectures, the first three of them (pp.1 - 98) are devoted to a critical study of the Qur'ān and the idea of sunna. After expressing his views in his first two lectures on the topic of "The Qur'ān as the basis of Islam" he, in his third lecture under the topic "The legal Supplement" concludes (1) that the Prophet had left no precepts or religious decisions, i.e., had left no sunna or ḥadīth outside the Qur'ān; (2) that the Sunna as practised by the early Muslim Community after Muhammad was not at all the sunna of the Prophet but was the pre-Islamic Arabian usage as it stood modified through the Qur'ān and (3) that later generations in the 2nd

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1. Ibid., pp.150-70.

2. For a full acquaintance with the method adopted by this writer in this regard, see above pp. 4-5 and below pp. 38

century A.H., in order to give authority and normativity to this usage, developed the concept of sunna of the Prophet and forged the mechanism of hadīth to realize this concept. After him, H. Lammens in his Islam: beliefs and institutions (London, 1929) followed the same view and declared tersely that the Practice (sunna) must have preceded its formation in the hadīth.<sup>1</sup>

After the above mentioned scholars Joseph Shacht stepped into the field. He was a scholar of such vast learning and competence that his book The Origin of Muhammadan Jurisprudence is regarded today as the classic piece of research into the field and has been reprinted four times, most recently in 1975.<sup>2</sup> The significance of this book, in our view, lies in his rigorous application of Goldziher's thesis regarding hadīth and sunna in trying to explain the entire development of Islamic Jurisprudence during its formative phase. However, it appears that he carried the above thesis of Goldziher, perhaps to its farthest limit. Because, as far as Goldziher is concerned, he had, at least, maintained that the phenomenon of hadīth goes back to the earliest time of Islam and even conceded the possibility of the existence of informal hadīth records contemporaneously with the Prophet, although he voiced his scepticism about the alleged records

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1. See chapters IV and V in his book.

2. First published in 1950.

(ṣahīfas) of that period.<sup>1</sup> However, the main argument of Goldziher runs, since the corpus of hadīth continued to swell in each succeeding generation and since, in each generation, the material runs parallel to and reflects various and often contradictory doctrine of Muslim theological and legal schools, the final recorded products of the hadīth which date from the third century A.H. must be regarded as being on the whole unreliable as a source of the Prophet's own teaching and conduct.<sup>2</sup> But it appears that Schacht carried the above scepticism of Goldziher to the point of declining to recognise the authenticity of each and every legal tradition.<sup>3</sup> Moreover, he has further developed the trends initiated by Margoliouth and has argued that (1) the traditions from the Prophet did not exist at all until about the middle of the 2nd century A.H.; (2) that the usage or Sunna until that time was regarded not as the Sunna of the Prophet but as the sunna of the community and it was mainly the product of the free reasoning of individual lawyers and (3) finally that the natural resistance of the lawyers to the traditions from the Prophet was broken

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1. It is to be noted, as Fazlur Rahman has pointed out, Goldziher "had maintained that immediately after the advent of the Prophet, his practices and conduct had come to constitute the Sunna for the young Muslim community and the ideality of the pre-Islamic Arab usage had come to cease" (See his Islamic Methodology in History, Karachi, 1965 A.D.). Cf. Goldziher, Muslim Studies, II, ch.2 and 8.
  2. Ibid.
  3. Orig., p.149.

by the efforts of al-Shaf'ī, who, for the first time, systematically introduced into the legal theory of Islam the concept of the sunna of the Prophet.

The above views of Joseph Schacht while, on the one hand, are generally acclaimed by the Islamists of the present time, on the other hand, several well-argued theses<sup>which are</sup> at variance with Schacht's views and sometimes contradicting them, have already been presented by some competent scholars such as Fazlur Raḥmān, Z.I. Ansārī and Aḥmad Ḥasan (they will be mentioned later). However, since the publication of Origins no other European scholar has produced any significant work in the field of early history of Islamic law. The latest work, viz., N.J. Coulson, A History of Islamic Law (Edinburgh, 1964 A.D.) though, dealt with the genesis of Sharī'a law in its first part, yet it does not make any significant contribution to the existing fund of knowledge in the field. Nor does this work aimed at that, but instead it addresses itself to a much more modest purpose "to show the present stage of western scholarship in the concerned area of study. It is not less significant, however, that Coulson in the introduction of his book has indicated the need for new research in the field to be carried out. He, having reviewed the state of western scholarship in the field, suggests that, in Islamic law, a distinction between the ideal doctrine and actual practice, between the Sharī'a law as expounded by the classical jurists and the positive law administered by the courts, is inherent. This provides in his view a convenient basis for historical inquiry which would simply proceed along the lines of the extent to which the

practice of the courts has coincided with or deviated from the norms of the Shari'a. However, he does indicate that the nature of Muslim legal literature coupled with the absence of any system of law reporting naturally makes such an inquiry a task of considerable difficulty. He, then, conceded that although some light has been shed on certain aspects of this problem by Western scholarship, the extent to which the ideal law has been translated into actuality in a given area at a given period remains a grave lacuna in our knowledge of Islamic legal history.<sup>1</sup>

Another significant thing to mention about Coulson is that while he accepts the theory of back projection of legal tradition that was developed by Schacht, he expressed his scepticism about his notion of denying the authenticity of practically every alleged ruling of the Prophet. This, according to Coulson creates a void in the picture of the development of law in early Muslim Community and from a practical standpoint and taking the attendant historical circumstances into account the notion of such a vacuum is difficult to accept. He therefore suggests that the substance of many traditions, particularly those which deal with the obvious day to day problems arising from the Qur'anic laws may well represent at least an approximation to a decision of the Prophet which had been preserved by general oral traditions. Coulson himself is of the view that "an alleged ruling of the Prophet should

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1. Ibid. See the introduction of the book.

be tentatively accepted as such unless some reason can be adduced as to why it should be regarded as fictitious".<sup>1</sup> This opinion is radically at variance with the views of Schacht whose fundamental premise is that "every legal tradition from the Prophet, until the contrary is proved must be taken as the fictitious expression of the doctrine formulated at a later time".<sup>2</sup>

Among the Muslims, interest in the historical aspects of Islamic law is even more recent. This does not mean that Muslim scholars of the past lacked historical consciousness altogether. There is, however, a perceptible difference between the attitudes of scholars of the present time who are interested in the history of Islamic law as such and the Muslim scholars of the past. This lies in the fact that the latter's interest in the Islamic legal sciences was so absorbing and their curiosity about the historical aspects of the laws was so feeble that they could have hardly thought in terms of making it the subject of a special study.

During the last fifty years, however, the history of Islamic law has been the subject of several works produced by

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1. Ibid., pp.64, 65. Another eminent Orientalist, W. Montgomery Watt has taken a less sceptical view of the early sources. The subject of Watt, however, is Sira rather than legal institutions. His views are nevertheless significant. See his book Muhammad at Mecca, Introduction, pp.xi - xvi.
  2. Orig., p.149.



the Muslim scholars. The first mentionable work was that of Mohammad al-Khudarī (d.c. A.H.), Tārīkh al-Tashrī' al-Islāmī (Cairo, first published in 1920 A.D.) and that of Muḥammad b. al-Ḥasan al-Ḥajawī (d. 1376 A.H.), al-Fikr al-Sāmī fī Tārīkh al-Fiqh al-Islāmī, 2 vols (first published in 1345 A.H.). By the forties of the present century of the Christian era, the history of Islamic law had already become a fairly popular subject. 'Alī Ḥasan 'Abd al-Qādir, a graduate from al-'Azhar and subsequently a Ph.D. from the University of Berlin, wrote his Nazra 'Amma fī Tārīkh al-Fiqh al-Islāmī, vol.1 (Cairo, 1361 A.H./1942 A.D.). Both of the earlier mentioned works were merely elaborations of the classical Muslim image about the past of the Islamic law. 'Abd al-Qādir, however, shows awareness of some of the issues raised by western scholars, though he treats them rather cursorily. Subsequently, Muslim scholars have produced a considerable number of books. Muḥammad Yūsuf Mūsā (d. 1963 A.D.) wrote his Muhādarāt fī Tārīkh al-Fiqh al-Islāmī, 3 vols., (Cairo 1954-6 A.D.). Muḥammad Abū Zahra wrote a series of books on the founders of Islamic legal schools which throw valuable light on the problems which were under discussion in their times, characteristics of their legal methodology and their contribution to Islamic law.<sup>1</sup> A very valuable book which was produced by a traditional Muslim scholar of vast learning is Alī al-Khafīf's Asbāb ikhtilāf al-Fuqahā'

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1. For the list of books of Abū Zahra see the bibliography at the end of this thesis.



(Cairo, 1375/1956 A.D.), which is a very good illustration of the manner in which a highly educated Muslim jurist with the traditional background of education looks at the early centuries of Islamic law. Aḥmad Amīn (d. 1955 A.D.) who had been educated under the traditional Islamic system of education, but had subsequently acquainted himself with western writings, also throws light on some of the basic issues which are relevant to the history of Islamic law. Aḥmad Amīn, however, was not specifically concerned with the history of Islamic law as such and therefore he did not treat the subject comprehensively. His remarks, on the relevant problems concerning this question form a part of his attempt to present, in broad outlines, the entire cultural and intellectual history of Islam. What is striking about Amīn is the fact that he is more keenly conscious than his contemporary Muslim scholars, of the element of the historical growth and development even in matters such as fiqh. He is more keenly aware of the relationship between ideas and the social/material milieu, in which they arise and develop and he tries, with considerable boldness, to use whatever notions he acquired from his study of western writers.<sup>1</sup>

In the Indo-Pak sub-continent, the first work that should be mentioned on the subject was Sīrat al-Nu'mān by Shiblī Nu'mānī, a biography of Abū Ḥanīfa (d. 150 A.H.) with a study of his juristic method.<sup>2</sup> Even though the book is now dated, it

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1. See his book Fajr al-Islam (Beirut, 1969).

2. This book first appeared in 1893. Most recently it has been published from Lahore, Pakistan, n.d.

was a valuable piece of pioneering work and its standard was considerably higher than the general standard of historical scholarship at that time in the sub-continent. This book had appeared around the turn of the century after which no other significant work appeared for a considerable period of time. After this interregnum several books came in quick succession. One of them was Fiqh Islāmī kā Tārīkhī Pas Manzar (Lahore, 1961 A.D.) by Muhammad Taqī Amīnī. This book, however, does not make any substantial improvement on the above mentioned book of al-Khudari. Two other noteworthy works appeared in the sixties, namely Islamic Jurisprudence (Karachi 1382/1962 A.D.) by Kamal A. Farooqi and Islamic Methodology in History, (Karachi, 1965 A.D.) by Fazlur Rahman. The doctrinal section of Farooqi's work is preceded by a brief section on the early history of Islamic law (pp.21-33), which, however, is not of much significance except that it reflects some influence of the western researches on the subject. The work of Fazlur Rahman, though, is a research of very considerable significance. However, it does not deal in detail with the development of Islamic law and jurisprudence, but is centrally concerned with the growth of the Islamic methodology over the entire course of Islamic history. It is in this context that he attempted to study the historical development of concepts such as sunna, ijtihād and ijmā' and its impact on the outlook of Muslims. The distinction of this work, in my view, lies in the fact that it takes serious notice of the questions raised by the orientalist, such as the concept of sunna of the Prophet developed at a later period. Moreover, Fazlur Rahman's disagreement with the views, generally

entertained by Muslim scholars is also quite significant. For he holds the opinion that the Sunna-content left by the Prophet was not very large in quantity and that it was not something meant to be absolutely specific; that the concept of the sunna after the time of the Prophet covered validly not only the sunna of the Prophet himself but also the interpretation of the Prophetic sunna; that the sunna in this last sense is co-extensive with the ijmā' of the community which is essentially an ever expanding process and finally that after the mass-scale hadīth-movement the organic relationship between the Sunna, ijtihād and ijmā' was destroyed. The same views are restressed by him in his book Islām (Chicago, 1966) which is one of the best descriptive and interpretative accounts of Islam and of the general history of the ideas in the Muslim world.<sup>1</sup>

After Fazlur Rahman, two important Ph.D. theses, specifically in the field of the early history of Islamic law, have subsequently appeared. These are Z.I. Ansārī's The Early Development of Islamic Fiqh in Kūfā; with special reference to the works of Abū Yūsuf and Shaybānī" (McGill University, 1966)<sup>2</sup> and Ahmad Husain's Jurisprudence in the Early Phase of Islam (Karachi University, 1967).<sup>3</sup> The first mentioned work, investigating the stage of development in fiqh in Kūfā, is centrally focussed on

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1. Ibid., see chapters III, IV and VI.

2. His thesis is still unpublished. This writer has gone through the microfilm copy of his typescript thesis.

3. It has been published with the name The Early Development of Islamic Jurisprudence (Islamabad, 1970).

the second century A.H. In this regard, the author carries out a semantic survey of the terms in use, such as hadīth, sunna, ijmā', ra'y, qiyās, istihsān, mandūb and makrūh, etc. The main conclusion of his analysis in this regard is a lag between the conceptual and semantic development of fiqh — the former always remaining ahead of the latter. A number of concepts remained in use for a long period of time, before they acquired standard technical phraseology for their expression. Hence he argues that some of the fundamental concepts such as sunna of the Prophet, consensus, etc. are anterior to the period when they began to be expressed by means of the technical terms. Moreover, he reaches the conclusion that even though there was a semantic lag, yet the formulation of technical terms, with accurate connotation, was well on its way during the second century A.H. Some of the concepts, such as qiyās, istihsān, had already acquired fully-fledged technical terms. There were others which seemed to be on the verge of this such as sunna, mandūb and makrūh. After this semantic analysis of the terms, the author, borrowing the distinction, made by al-Shaybānī, between khābar lāzim and qiyās, divides his thesis into two parts, namely khābar lāzim, (by which he probably meant the binding transmitted material) and Inferences, Elaboration and Systematisation. Under the first mentioned heading, he attempts to explore the constituents of khābar lāzim and concludes that they were the Qur'ān, Sunna, the Consensus of the Muslims, of the Companions and of the Fuqahā'. The discussion on sunna, however, occupies a considerable portion of Ansārī's work and leads him to conclude that (i) the authority of the precepts and practices of the

Prophet has remained unquestioned all through; (ii) the authority of sunna consisted, however, not merely of the sunna of the Prophet, but included the sunna of the Companions as well. The latter, however, did not derive its authority at the expense of, but through the sunna of the Prophet; (iii) that Traditions from the Companions were occasionally allowed to prevail over Traditions from the Prophet. This was because, at times a tradition from some Companion was deemed to be a more trustworthy mirror of the sunna of the Prophet than a sunna which claimed to have come down from the Prophet, this claim being considered of doubtful validity; (iv) that apart from traditions from the Companions reference was also made to established practice. The sanction behind this practice, however, was in general the assumption that it had originated in the time of the Prophet or in the time of Companions and its introduction was either on their initiative or approval; (v) that traditions from the Successors and the doctrines of accredited jurists were also often adduced. These were considered to be weighty but not binding and hence did not form part of khavar lāzim. (vi) The fundamental difference between the ancient school and Shaff'ī was that to the latter, sunna was identical with well-attested traditions from the Prophet. In the ancient schools, sunna was not necessarily embodied in the form of tradition from the Prophet. Traditions from the Prophet were merely one evidence of sunna. There were other evidences as well, such as practice and traditions from the Companions. (vii) The Kufans were ahead of their contemporary Medinans and Syrians, in so far as they paid less attention to practice and generally based their doctrines on

traditions from the Prophet and from the Companions. Moreover, they generally tended towards greater strictness in the application of traditions and from the decrease in the use of ra'y in their interpretation and enforcement. On the whole the Kufans were closer to, and in several aspects prepared the ground for Shaf'ī's identification of sunna with well-attested traditions from the Prophet, including the isolated ones.

As to the second part, namely, "Inferences, Elaboration and Systematisation", the author deals with ra'y, qiyās and istihsān. In this regard he concludes that (i) in the earlier phase there was a relatively free use of ra'y, that is, jurists discretion based on considerations of common good, the broad interest of religion, administrative convenience and substantive justice. By and by it developed in the standard form of qiyās. (ii) The above mentioned considerations, even in the later period continued their influence, although less than before, and were accommodated under the name of istihsān. To sum up the conclusions of Ansari's work, he confirms Schacht's conclusion "technical legal thought, as a rule, tended to become increasingly more perfect from the beginning of Muhammadan Jurisprudence up to the time of Shaf'ī" and explains that this applies to Kufa as well. Moreover, he concludes that in respect of technical legal thought Kufa's standard appears to have become more highly developed than the other contemporary schools. It had reached its zenith in al-Shaybānī. The Kufans, in respect of both the legal theory and technical legal thought, stood midway between ancient schools and al-Shaf'ī.

Ahmad Hasan's work is aimed at showing the historical



development of Islamic Jurisprudence in general during the first two centuries after Hijra. His study in this regard is mainly based on the works of Mālik, Abū Yūsuf, al-Shaybānī and al-Shāfi'ī. Dividing his dissertation into eight chapters, he discussed the meaning of the term fiqh and other allied terms, origins of the early schools of law, the theory of naskh, early concept and development of sunna, early modes of ra'y, ijtihād, qiyās and istihsān, the doctrine of ijmā' in the early schools and finally, the role of al-Shāfi'ī in the development of Islamic Jurisprudence.

In respect of the meaning of the term fiqh and other allied ones he goes on to conclude that the terms originally had wider meaning which changed and became restricted in the course of time. In the early stages, the term ra'y and riwāya were used in opposition to each other. Later on ra'y developed into law (fiqh) and riwāya into hadīth. With regard to the sources, he confirms that during the earlier stages the four roots of law were interlinked and united with their natural organic ties. The Qur'ān and Sunna, constituted one source and qiyās and ijmā' were developments. A strict technical order of priority in the four sources is found in al-Shāfi'ī's work; such a formal procedure was not there in the early schools. Moreover, he concludes that ra'y-ijmā' process was changed by al-Shāfi'ī; this, in the words of the author, had marred the efficacy of ra'y and ijmā'; ijmā' was restricted by him to the early generations and had become something like a tradition known through a report. As to his analysis of the theory of naskh, he finds that the theory does not go back to the time of the Prophet. No verse of Qur'ān has been abrogated, since all the verse in the Qur'ān

can be shown to be operative in the light of their historical perspective. Sunna was a wider concept, and the two terms, hadīth and Sunna were not identical in the pre-Shāfi'ī period. It was al-Shāfi'ī who removed the distinction between hadīth and sunna by his emphasis on documenting the latter by the former only. The necessity of introducing hadīth into law was originally felt when the continuous normative practice was faced with break-up through acute differences of legal opinion. The concept of the sunna of the Prophet had its origin in the Prophet's time when the Qur'ān required obedience of him by the Muslim, but as hadīth was introduced as a universal principle in law, the content of sunna became much larger. As a result of al-Shāfi'ī's emphasis on textual evidence, the concept of nass acquired a dominant position in legal reasoning and became a substitute for the ra'y-ijmā' phenomenon. Unrestricted ra'y was violently attacked by al-Shāfi'ī, and therefore qiyās was naturally narrowed down to nass. The concept of nass during Shāfi'ī's time grew progressively rigorous and culminated into a comprehensive term being subdivided into several kinds covering even allusion and implication.

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In the foregoing pages we have made a rather detailed survey of the contemporary literature relating to the general field of early history of Islamic law. This survey shows clearly that several studies have already been carried out to investigate the different aspects of the early development of Islamic Jurisprudence. Indeed, these studies shedding light on very important issues, must be regarded as a valuable asset in



the field. However, it is very clear that the above mentioned studies were aimed only at analysing and investigating certain essential ideas of the early development of Muslim legal theory. No serious effort has so far been made to discover the history of positive and categorical laws of Islam which were evolved, formulated and actually practised in the earlier phases. Hence a grave lacuna in our knowledge of Islamic legal history, which Coulson has already pointed to,<sup>1</sup> still remains to be filled. The present study, however, must not be regarded as mainly concerned with filling the above hiatus. Nor was the present study motivated by this idea, nor does it actually embody a work that can completely fill such a grave gap in the present knowledge of Islamic legal history. Instead, this writer was basically motivated by the idea that even if the early development of Islamic legal theory and its essential ideas themselves can not be fully ascertained, ~~except~~<sup>only</sup> by the means of a close and thorough study of the actual early development of the positive and categorical laws of Islam. Moreover, this writer is of the view that such a study must be carried out along the lines as to how ijtihād evolved and played a significant and extensive role in the formulation of the Islamic laws, in a given area at a given period. Specifically the first century after Hijra, which definitely precedes the birth of all the existing madhāhib al-fiqh (schools of jurisprudence) of Islam, is the most important period in this regard. Our forerunners in the field were well aware of the importance of this period, as is apparent from their writings.

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1. Supra, p. 23

However, they were perhaps reluctant to carry out such a study apparently due to the scarcity of material in the early sources on which the above study of legal history could have been built. The situation in the present time has considerably changed. Vast new material, which was not accessible to them is now available to the student in the field. Especially the publication of voluminous work of the second century A.H., viz., al-Musannaf of 'Abd al-Razzāq, 11 vols., (Beirut, 1971 A.D.)<sup>1</sup>, has provided a mine of information to the modern researcher. It has, therefore, become feasible now to carry out such a study.

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1. Supra, pp.8-9.

## CHAPTER I

### THE PERIOD OF THE PROPHET

(13 B.H./610 A.D. - 10 A.H./633 A.D.)

This chapter is confined only to the period of the Prophet and three major questions pertaining to the development of ijtihād in this period are dealt with:

1. How were the laws of zakāt formulated and how did they evolve in this period? In this connection the determination of the fundamental concept behind zakāt is carried out, followed by a study of the various stages in the formation and evolution of their legal and practical form. We finally present the detailed zakāt laws practised in the Prophet's Medina and in the areas governed from it during the later years of the Prophet's life.
2. Did ijtihād play any role in the formulation and development of zakāt law during the above period? If it did, then what was its extent and nature? In order to find an answer to the above question a critical study of the views and controversies between various later Muslim jurists on the idea of "Prophet's ijtihād" has been made, and, as shall become evident in what follows, we have attempted to pinpoint the ijtihādīc component of zakāt laws while establishing the existence of ijtihād in the same period.

3. What principles and methods of ijtihād were adopted in the sphere of zakāt laws in the said period? What were the different modes and ways that went into the formation of the ijtihādic component of these laws? For this purpose an analytical study of zakāt laws is carried out, keeping the following points in mind:

- a) Sources and limits of ijtihād.
- b) Modes of ijtihād.
- c) The relationship between usūl (principles) and fur ū' (derivatives) and mutual relationship between different derivatives.

The twenty-three years of Muhammad's prophetic life consist of thirteen years in Mecca and ten years in Medina. This period in Mecca commenced in 610 A.D. after he proclaimed himself Prophet (at the age of forty) and started his prophetic mission of reformation, what the Qur'ān describes as revival of the religion of Ibrāhīm,<sup>1</sup> who was regarded by Islam as progenitor of the Arabs<sup>2</sup> and a prophet of God.<sup>3</sup> The Prophet started his mission by reciting Qur'ānic āyāt (verses) or sūras (chapters) at the different local gatherings and in his prayers. These āyāt and sūras were believed to be revealed to him, piecemeal, by God according to the time and situation. The āyāt and sūras, which were reportedly revealed in Mecca, and consist of a biting

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1. See Q. 6:162.

2. See Q. 22:78.

3. Q. 19:41.

criticism of the doctrines, morals, social outlook and character of Arab pagans, of a sharp warning, and of a depiction of the punishment and reward of the hereafter, cover more than half of the Qur'ān. We have detailed reports about most of these Meccan sūras which claim to show the exact time and events of their revelation.<sup>1</sup> However, apart from these reports, the contents and internal evidence of these sūras, themselves, lead us to form a view of the various gradual stages and the developing circumstances in which these pronouncements to the public might have been made from time to time.<sup>2</sup> Consequently these Meccan sūras constitute the earliest and most reliable source for the study of the early basic concept of zakāt and its evolution. The later compilations of history and traditions can only provide secondary evidence in this regard.

The Meccan revelations which on the grounds of reports or on the grounds of their internal contents can be dated before the emigration to Abyssinia, indicate that not only did the Qur'ān pay attention to the problem of poverty and its solution, from the very earliest, urging people to help the poor, orphans and deprived, but going beyond that, the Qur'ān regarded it as an obligatory duty of well-to-do people to do so and maintained

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1. These reports are scattered in the early books of hadīth, Tafsīr and Tārīkh such as al-Muṣannaf of al-Ṣan'ānī, Sīra of Ibn Hishām, Tabaqāt of Ibn Sa'd, Tafsīr al-Qur'ān of Ibn Jarīr Ṭabarī and his work on history. It appears that this subject later would have evolved into an independent science. Consequently separate books had been written on the subject. The first available book on the subject is of Wāhidī (d. 468) Asbāb al-Nuzūl (published in Cairo 1968).
  2. Supra, the introduction, p.5

that the poor had a right to share their wealth. For this sort of spending the words ātū al-zakāt are also used in the above mentioned part of the Qur'ān.

The sūras al-Duhā and al-Mudaththir both belong to a very early stage in the Meccan period.<sup>1</sup> In the first sūra the Prophet is reminded that when he was an orphan God gave him shelter, when he was ignorant He showed him the right path, when he was poor He made him rich and, then, the Prophet is instructed not to be hard on orphans and not to chide the ones who ask, and to maintain in acknowledging openly the blessing of God.<sup>2</sup> Similarly, in the second sūra, while depicting the "Hereafter", the Qur'ān states that those on the right will be in the Gardens and will ask the guilty ones about what brought them to Hellfire. These will then answer that they did not pray nor did they feed the poor and they joked and denied the Day of Judgement, now, we are confronted with this certain truth.<sup>3</sup>

In another sūra, al-Hāqqa dating from the same period,<sup>4</sup> the same thing has been expressed in a slightly different way in

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1. I. Hishām., vol.I, p.260.

2. Q. 93:7-13.

3. Q. 74:41-48.

4. It appears that this sūra would have been revealed before Islam of 'Umar b. al-Khaṭṭāb, because according to a report, 'Umar had already heard the Prophet reciting the sūra and it was the ayāt 38-52 of this sūra which made a first strong attack on his heart. Many other things, however, after hearing the sūra, culminated in his final conversion to Islam. (See Mus.H. vol.I, p.201 and Taf., vol.6, p.69).

a different context. In this case, while describing the "Hereafter", it is stated that the order of God for the criminal will be for him to be seized and fettered and cast into "Hell" and bound and chained for the crime of neither believing in God nor urging others to feed the poor.<sup>1</sup>

It is not difficult to gauge the effect of these promptings and evocations of fear of God on the newly converted. Probably after hearing these verses, Abū al-Dardā,<sup>2</sup> a newly converted Muslim, must have uttered these remarks to his wife which Abū 'Ubayd has quoted in his K. al-Amwāl, "O mother of Dardā"! God has a chain which is consistently being heated in Hellfire until it will be put round the neck of the guilty. God has, by giving us īmān (belief) saved us half of this wrath, to escape the other half, you must urge me to feed the poor".<sup>3</sup>

Sūra al-Dāriyāt and al-Ma'ārij too are, according to reports and on account of their contents, close to the period of the migration to Abyssinia.<sup>4</sup> In these sūras there is mention of a definite right of the needy and deprived to a share in the property of those who have it. In al-Dāriyāt, in the context of a description of the "Hereafter", while describing the heavenly blessings for the pious, it is explained that they deserve these blessings, because in their previous life they slept little at night and in the later phases of night asked for

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1. Q. 69:30-34.

2. D. 31 A.H.

3. Amw., p.350.

4. See Wah., p.250 and Taf., vol.V, p.130 and vol.6, p.84.

his forgiveness and in their wealth the needy and deprived had a haqq (share).<sup>1</sup> In al-Ma'arij, where the severity of punishment is described, it is stated that the guilty would wish that he could give his wife, brother, other relatives who protected him, and all the people of the world to save himself, but he will not be able to escape from wrath, for there will be a flaming fire that will lick the flesh and which will call everyone to itself, who turned his back and retreated, hoarded wealth and withheld it. After this it is mentioned that man has been created impatient. When hardship visits him, he cries out and when he becomes prosperous he becomes niggardly. Only those who pray regularly and in whose wealth the needy and deprived have an haqq ma'lūm (definite share), can escape this vice.<sup>2</sup>

The words of haqq (share) and haqq ma'lūm (a definite share) of the needy and deprived in the wealth of well-to-do people point to a concept which was taking shape and which was apparently at variance with the popular notion of generosity and hospitality of the Arabs. Generosity and hospitality were counted as among the oldest virtues of Arabs. To arrange public meals, and spend lavishly on such occasions was one of their older traditions but what was unacceptable and new for them was to give to the poor, not charity but a rightful share. It can be felt quite clearly that the Qur'an was specially instructing this, and announcing the warning of wrath to those who were reluctant or niggardly in this regard. Thus, the following

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1. Q. 51:17-19.

2. Q. 70:12-26.



verses from sūrat al-Fajr, which consist of castigation and criticism of the general moral condition of the non-believing Arabs clearly illustrate this point. "Nay, not only, do you not respect the orphan, nor do you urge one another to feed the poor and swallow all that you inherit and are deeply in love with wealth".<sup>1</sup> The same criticism of the non-believing Arabs can be found in sūrat Hāim al-Sajda, which appears to have been dated before the Islam of 'Umar but after the Islam of Ḥamza<sup>2</sup>, "Destruction shall visit those non-believers who don't pay zakāt and deny the existence of Hereafter".<sup>3</sup>

It appears from the use of the word 'zakāt' in the above mentioned āya that close to the Abyssinian migration the word zakāt as a term was already in use among the believers. This is further confirmed by the speech delivered by Ja'far b. Abī Tālib, as the leader of Muslim immigrants in the court of al-Najāshī. In this speech he has described the social, moral and doctrinal ills of the Arabs, the appearance of the Prophet, his teachings, finally mentioning the injustices and torture perpetrated upon them by the Qurashites on the Prophet's followers. He pointed out that they had emigrated to Abyssinia in the hope that no injustice shall be done to them. In this speech, apart from other things, the payment of zakāt is also

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1. Q. 89:17-20.

2. See I. Hisham, vol.1, p.213 and Taf., vol.4, pp.434-35.

3. Q. 4:6-7.

mentioned as one of the teachings of the Prophet.<sup>1</sup> The second evidence in this regard comes from the part of sūra al-Maryam (relating to Christ and Yahyā) that was recited by Ja'far, after his speech, at the wish of al-Najāshī.<sup>2</sup> In this sūra, while mentioning Christ, the following words are mentioned, "God has commanded me that as long as I live I must pray and pay zakāt".<sup>3</sup>

Of the sūras revealed before and after the Abyssinia immigration, but proximate to it, the terms "zakāt" and itā' al-zakāt were also mentioned in "Luqmān", "al-Naml" and "al-Rūm".<sup>4</sup> In the first two sūras the words itā' al-zakāt are used in conjunction with iqāmat al-salāt.<sup>5</sup>

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1. I. Hish., vol.I, p.359; cf. Wansbrough, Qur'anic Studies (Oxford, 1977) pp.38-40. Wansbrough, comparing the contents of Ja'far's speech with the different verses of the Qur'ān, found both of them correspond with each other. He, however, concludes that the exact relationship between the two is not immediately clear because of the view that either the injunction expressed in Ja'far's speech must be regarded as the subject of revelations before the emigration to Ethiopia, or it must be assumed that they represent Prophetical logia later confirmed by or incorporated into the text of scripture.
  2. I. Hisham, vol.I, p.359.
  3. Q. 19:31.
  4. For the exact period of these sūras, see Wah, pp.197-99; Taf. vol.III, pp. 552 and 724, vol.IV, p.6.
  5. See Q. 31:5 and Q. 27:4, the Arabic words are: "al-ladḥīna yuqīmūna al-salāt wa yūtūna al-zakāt wa hum bi-al-'Ākhira hum yuqīnūn".

In accordance with the general style of the Qur'ān, when the word zakāt is used in this conjunction, it should be interpreted in relation to wealth.<sup>1</sup> In the ~~last~~ mentioned sūra, "al-Rūm", in the context of ribā it is impossible to interpret as relating to anything other than the wealth.<sup>2</sup>

Hence there is no obstacle in concluding that the term zakāt and itā' al-zakāt were current in the sense of relating to wealth, by the middle of the Prophet's Meccan period. However, this does not imply that other words were not used in this period for the sort of spending which is mentioned above. Therefore the instances of the use of the verb infāq (to spend) in this sense can also be traced from the verses revealed in this period.<sup>3</sup> Rather it appears that the words 'it'ām al-Miskīn or al-Hadd 'alā 'it'ām al-Miskīn, Infāq or 'infāq fī sabīl Allah, and zakāt or itā' al-zakāt have been in use side by side. Nonetheless instances of the use of the word "Sadaqa" in this sense can hardly be found in the Meccan verses. Although this

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1. For the general acquaintance with this sort of conjunction in the Qur'ān, see Q. 2:43, 83, 110, 177, 277; Q. 4:77, 162; Q. 5:12, 55; Q. 9:5, 11, 18, 71; Q. 21:73; Q. 22:41, 78; Q. 24:56; Q. 33:33; Q. 58:13; Q. 73:20; Q. 98:5.
  2. See Q. 30:38-40, the translation of the complete āya is "Whatever you pay out as ribā (interest) that it may foster the wealth of the people. In fact it does not increase (their wealth) in the sight of God, but whatever you remit as zakāt, seeking the pleasure of God, that is eventually multiplied manifold.
  3. It appears that, beside the above mentioned meaning, the verb infāq was also being used at the Meccan period in the sense of general spending. See for example Q. 18:42, 34:39, 25:67, 17:10. However, in the other Meccan verses the use of the verb infāq with a few special contexts such as sirr wa 'alā'iya or jahr and yarjūna tijāra lan tabūr specifies its meaning only in the above mentioned sense. See Q. 13:22, 16:75, 35:29, 36:47, 42:8.

was subsequently used as a term later in Medina, there is no instance of its use in any of the verses of the Meccan period except sūrat Yūsuf<sup>1</sup> which was revealed right at the end of the Meccan period.<sup>2</sup>

It is apparent from the above related statements that the concept of apportioning a part of one's wealth for the sake of God was not an innovation of the Medinan period, but had existed in the Muslim community since the very early days of Islam in Mecca, and this sort of spending was an obligatory duty of the well-to-do believers. However we do not have any evidence to prove whether or not some specific rates or minimum limits of zakatable wealth were current among the Meccan Muslim community and whether a system of collection and distribution was introduced among them or whether it was left to the individual to spend it himself on the deserving who had already been specified in the Meccan verses.<sup>3</sup> However, one could speculate that the state of fear in Mecca was not suitable for the promulgation of such regulations and establishment of any organised institution in this regard. Therefore all regulations relating to zakāt can only be assumed as a new development of Medina. It is quite possible that the well-to-do believers in Mecca apportioned a part of their wealth without any rates and spent it on orphans, poor, needy, deprived, prisoners and

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1. Q. 12:88, the form Tasaddaqa and al-Mutasaddiqin are used.
  2. Taf., vol.II, p.378; Wah., p.155.
  3. Supra, pp.39-42. See also Q. 30:38, 90:11-16, 36:47 and 17:26.

wayfarers according to their own discretion. It must be kept in mind that all these heads and categories are repeatedly mentioned in different places of many Meccan sūras.<sup>1</sup>

It is also evident that, in the Meccan period of intense ideological conflict and struggle, the deserving believers would have been preferred in this matter over the deserving non-believers. There is no hint of this sort in the Qur'ān, however, rather in the early verses of Qur'ān, the believers were instructed to feed the poor, and to urge one another to do so, certainly, without any such discrimination. However, this matter must be viewed against the background, that a considerable number of believers in this period were already poor and most of the influential wealthy and famous capitalists were in the opposing camp as is indicated by the Qur'ānic āyāt of this period "leave me alone with those wealthy and self indulgent ones, who reject the truth and give them a little respite".<sup>2</sup> Added to this was the economic victimisation, these people suffered at the hands of the non-believers through different tactics and economic boycott as a punishment for the crime of believing. It is, therefore, not improbable that the focus of attention of the zakāt payers, in this period, must have been the deserving believers. This also appears from the conversation of Abū Bakr and his father Abū Quḥāfa which is reported by Ibn Ishāq (d.151 A.H.). Abū Bakr had already freed several Muslim slaves after having

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1. Ibid.

2. Q. 73:12.

bought them. Having noticed this, Abū Quḥāfa said to Abū Bakr that if he were in his place he would have freed strong and well built men so that they could become his supporters and could stand by him at the time of need. Abū Bakr replied: "Dear father! I only seek God's pleasure through this".<sup>1</sup>

In 623 A.D., after facing opposition for thirteen years in Mecca, the Prophet's Islamic movement had found a new centre in Medina. Now it had become possible to begin to collect all its followers from the various parts of Arabia and to unify and strengthen them. Accordingly, the Prophet and the majority of the Muslim believers migrated to Medina. Then the Prophet's mission entered a new stage under totally changed conditions. Now that the Muslim community had begun to establish a state and an armed encounter ensued with the exponents of the old order. Therefore it is not surprising that the general instructions pertaining to zakāt, given in the Meccan verses of the Qur'ān were elaborated in detail in Medina. In fact, going beyond this, practical steps were taken to regulate and systematize the implication of the Meccan verses. This is the reason that the first speech delivered by the Prophet in Medina, just after his hijra, contains a demand regarding zakāt and infāq, that everyone must spend for the sake of God, even if it is a meagre amount.<sup>2</sup> Likewise, in the verses of sūrat al-Hajj, which was revealed

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1. I. Hish., vol.1, p.341.

2. I. Hish., vol.2, p.118.

at a very early stage in Medina,<sup>1</sup> the qualities of believers are defined in the context of them being granted permission to fight and that if power was given to them on earth, they should perform the prayer and pay zakāt, in addition to enjoining good and forbidding evil.<sup>2</sup> One should not be confused from this verse into thinking that instructions for the performance of regular prayers and payment of zakāt that were given to Muslims refer only to the time when they gained power. This is because this instruction had already been given (in Mecca) much earlier than the above mentioned verse. It is also proved by a verse of al-Nisā' in which the Prophet is addressed by God: "Did not you observe those who were instructed: Hold back your hands from fighting and perform the prayer and pay zakāt. Yet now that the fighting has been prescribed for them, a section of them have begun to fear people as they should fear God or even more, and they say, O lord why did you prescribe war for us, would you not grant us respite yet awhile".<sup>3</sup> This āya clearly indicates that

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1. There has been controversy among the orthodox mufasssirin (interpreters of the Qur'ān) about whether this sūra was revealed at Mecca or it belonged to the period of Medina. See al-Qurṭabī, al-Jāmi' li Ahkām al-Qur'ān (Cairo, 1967 A.D) vol.XII, p.1. Maudūdī, on the basis of his criticism and observation of its internal content, concludes that out of its 78 verses, the first 24 most probably belonged to the last years of the Prophet's stay at Mecca, while the rest were revealed at the very early time in Medina, most probably in the first year A.H. See Taf., vol.3, p.196.
  2. Q. 22:39-41. These verses, according to the reports are the first in which the permission of fighting was granted to believers. Consequently the practical steps in this regard against the Qurashites had begun in the form of the first military campaign known as Ghazwa' Waddān or Ghazwa' Abwā' in the month of Ṣafar, 2 A.H. See I.Hish., vol.II, p.8 and Tab. vol.II, pp.403-4.
  3. Q. 4:78.



the instruction of zakāt's payment had already been given before the permission of fighting. Therefore the above mentioned verse of al-Hajj can be interpreted only in relation to regulation and organisation of the institutions of zakāt and salāt with reference to the power of government on earth.

After the above mentioned verse of al-Hajj, the order in which performing prayers and paying zakāt were set side by side was repeatedly mentioned in the later Medinan sūras with the words of aqīmū al-salāt and ātū al-zakāt". However, it appears that in this early stage only the collection of zakāt or sadaqāt, in a centre, and its distribution to the deserving through the Prophet was considered sufficient. The fixing of any niṣāb (minimum zakatable ammount) or rate was not considered as necessary at this initial stage. Presumably it was also permitted that instead of bringing zakāt and sadaqāt to the Prophet, the zakāt payers could, if they wished, spend it for themselves on the deserving categories already mentioned in the Qur'ān. This is indicated by a verse<sup>in</sup> al-Baqara "If you disclose your sadaqāt, it is better and if you conceal and spend them by yourselves on the needy people it is also good for you, it will remove from you some of your vices and God is well acquainted with what you do."<sup>1</sup> As far as the categories of deserving beneficiaries are concerned, the same categories of the orphans, needy, deprived, poor relatives, and wayfarers are also repeatedly mentioned in the Meccan and early Medinan sūras.

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1. Q. 2:271.



However, special attention is drawn to these deserving poor who were detained in the cause of God and were unable to move about in the land to seek their livings. A man who did not know would consider them rich, looking at their sobriety and abstinence, for they don't importune people, yet you can recognise them by their foreheads.<sup>1</sup> Perhaps by mentioning this sort of needy person, attention was drawn to Ashāb al-Suffa or to those Meccans who had already emigrated to Medina, leaving everything in Mecca. In the later Qur'ānic verses the general head of fī sabīl Allah (in the way of God) was particularly pointed to,<sup>2</sup> however the specific heads such as needy and deprived, poor relatives and orphans were also repeated side by side.<sup>3</sup> In the year 9 A.H. after adding some more kinds of beneficiaries, the following seven heads of zakāt expenditure were finally specified as being a farīda min Allah (compulsory obligation enjoined by God).

1. Al-Fuqarā' wa al-masākīn (poor and needy people)
2. Al-'Āmilīn (zakāt collecting staff)
3. Mu'allāfat al-qulūb (those in whom inclination towards Islam is to be strengthened or created)

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1. Q. 2:273.

2. See Q. 49:15 and Q. 2:190, 261, 262, 273 and Q. 57:10. In particular the later mentioned sūra 57 (al-Hadīd) appear to be focussed on an appeal for infāq fī sabīl Allah. This sura was revealed in the period between Uhud and Hudaybiyya Treaty. See Taf., vol.IV, p.298.

3. Q. 4:8, Q. 2:177, 215, Q. 24:22.

4. Fī al-Riqāb (for the purpose of freeing slaves)
5. al-Ghārimīn (those who burdened with debts)
6. Fī Sabīl Allah (in the cause of God)
7. Ibn al-Sabīl (wayfarers)<sup>1</sup>

However, it appears that the practice of collecting zakāt and sadaqāt without specifying any rate of the limit of a minimum zakatable amount and of its distribution and spending by the Prophet in the above mentioned heads, was probably continued until the time of the victory over Mecca or at least until the Hudaibiyya Treaty. The reason behind this view rests on the fact that in this period, apart from the problem of the settlement of homeless immigrants, the continuous military campaigns of this time would have demanded much greater sacrifice and donations from the people rather than a specified rate of zakāt. It is confirmed by a verse which is revealed in this period "They ask you what they should spend: Tell them; Whatever is spare".<sup>2</sup> The other verses dating to this time, also contain the emphasis on this sort of infāq.<sup>3</sup> This is the

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1. Q. 9:60. The verses from 38 to 72 of this sūra were presumably revealed just before Ghazwa Tabūk (9 A.H.) when the necessary preparations for the Ghazwa were being made. See Taf. vol.II, p.166; I. Hish., vol.IV, p.170; Tab., vol.III, pp.100-6.
  2. Q. 2:219.
  3. Supra, p.50 f.2



the central theme of al-Hadīd, a sūra revealed about 5 A.H.<sup>1</sup> It clearly explains that spending in the cause of God before the victory is much greater in value and in rank than spending made after it and it asks who the one is, who would lend God a good loan so that He may increase it for him manifold, and give him a generous reward.<sup>2</sup> It is reported that after learning this sūra from the Prophet, immediately Abū al-Daḥdah al-Anṣārī, took the hand of the Prophet in his hand and said "O Prophet of God! I am giving my garden to my lord on loan." This garden had 600 palm trees and a house in which Abū al-Daḥdah was living with his family. After speaking he went into his home and left it, taking out his wife, children and the household.<sup>3</sup>

From this, one can judge what kind of infāq was demanded in the period before the victory of Mecca and what the response was of the believers in this regard.

However, it must be mentioned here, that "Zakat al-Fitr" and "Sadaqat al-Najwā" and their specified rates are dated before the conquest of Mecca. Zakāt al-Fitr was enacted in Ramādān of the second year after the immigration.<sup>4</sup> Accordingly it was

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1. Sūra no. 57. This sūra, according to a report from Anas b. Malik (d. 93 A.H.) revealed at a time when 17 years had passed since the beginning of the Qur'ānic revelations. Taf., V, 298.
  2. Q. 57:10-11.
  3. Taf., vol.5, p.310.
  4. See I. Sa'd., vol.1, p.248.

an obligatory duty on every well-to-do Muslim to provide one day's good for a number of his poor brothers, equivalent to the number of the members of his family, including slaves on the occasions of the 'Id day. The amount for this purpose was fixed as equal to one Sa'.<sup>1</sup> Probably it was intended that everyone should be able to enjoy and participate in the celebration of the 'Id.

Similarly, the verse in Surat al-Mujādala relating to Sadaqat al-Najwā (asadaqa for private consultation with the Prophet) was also revealed before the victory over Mecca.<sup>2</sup> According to a report from Zaid b. Aslam, the Prophet never refused anyone seeking a private meeting with him to such an extent that people started bothering the Prophet for such meetings, even when there was no need for privacy and these were the times when the whole of Arabia was at war with the Muslims. Consequently such whispers would give rise to rumours about attack from this or that tribe. On the other hand, this enabled the munāfiqin (hypocrites) to say that the Prophet was susceptible to every word he heard. On account of these reasons a constraint was introduced by God through the aforementioned verse that anyone seeking a private conversation with

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1. Ibid. Muw.Y. vol.1, pp.209-10.

2. Q. 58:12. This sūra was revealed approximately at a time after Ahzāb in 5 A.H. See Taf., vol.V, p.336. A similar report from Qatāda is also mentioned by Ibn Jarīr. See his Jami' al-Bayān fī Tā'wil Āvi al-Qur'ān, (Cairo, 1388/1968) vol.XXVIII, p.20.

the Prophet should first pay sadaqat al-Najwā.<sup>1</sup> It is reported that the Prophet, while seeking 'Alī's advice on the amount of this sadaqa, suggested a half diwar. 'Alī, however, replied that this would be too much and in turn suggested gold of the same amount as one seed of barley which the Prophet commented was too little.<sup>2</sup> This constraint was subsequently removed through another verse after a short period.<sup>3</sup>

As it is clear from the above lines the rates of Zakāt al-Fitr and Sadaqat al-Najwā were assessed in terms of a fixed amount per head rather than in terms of the actual amount of wealth and properties owned by the person paying zakāt, while in the matter of 'zakāt al-māl' the different rates and minimum zakatable amount subject to them were determined in terms of the kind and quantity of wealth involved. Taking into account the above consideration it is quite possible that the fixing of rates and minimum amount subject to zakāt al-māl would have taken place at a later period, i.e., after the victory over Mecca or at least after the Ḥudaybiyya Treaty.

Although it is difficult to pinpoint the year in which the rates of zakāt al-māl were introduced it is almost certain that these rates and the related regulations had been in force at the beginning of the ninth year after the hijra, before the time when the Prophet sent zakāt collectors to different tribes.

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1. Q. 58:12. For the report of Zayd b. Aslam see al-Qurṭubī, Op. cit., vol.XVII, pp.301 -2.
  2. Ibn Jarīr, Op. cit., vol.XXVIII, p.21.
  3. Q. 58:13.

This is because, not only did they collect zakāt and sadaqāt according to these regulations and rates, but they were also given instructions concerning the manner in which they should operate the regulations.<sup>1</sup> In addition to deputing zakāt collectors to various tribes, an appointment of zakāt collector in the capital of Medina was also made by the Prophet.<sup>2</sup> Anyway, by the year 9 A.H., the zakāt laws of the Prophet must have assumed their final shape.

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After having propounded the basic concept of zakāt its evolution and the different stages of its development during the Prophet's time, we will now state the details of zakāt laws which were current in Medina and in the areas governed by it in the last days of the Prophet's life.

The first question that arises in this connection is what were the items (according to the law) on which zakāt was levied, and what were the items exempted from it. All the available reports positively indicate that during the Prophet's time, zakāt was levied on al-māshiya<sup>3</sup> (animal properties),

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1. A. Dā'ūd, vol.II, pp.102-3 and vol.III, p.230. For the collectors, see I. Hisham, vol.IV, p.271; Tab., vol.3, p.147; San., vol.IV, pp.53-57.
  2. Waq. p.973; A. Dā'ūd, vol.II, p.115 (ḥadīth no. 1623).
  3. Muw.Y., vol.I, p.188; Muw.Sh., p.114.

al-‘ayn<sup>1</sup> (gold, silver and coins), al-harth<sup>2</sup> (agricultural produce), and al-rikāz<sup>3</sup> (buried treasure). Some reports assert that during this time zakāt was also levied on trading goods<sup>4</sup> and on honey.<sup>5</sup> However, horses and slaves were totally exempt from zakāt.<sup>6</sup> As regards animal properties, five or more camels and forty or more sheep were subject to zakāt - numbers less than these were, however, exempted.<sup>7</sup> It is difficult to ascertain exactly what the limit of exemption in the case of cows was, probably the reason behind that was that cows were not generally found in Hijāz.<sup>8</sup> In silver five uwāq<sup>9</sup> and in gold twenty dīnār were the minimum zakatable amount.<sup>10</sup> Dates less than five wasāq<sup>11</sup> of weight were exempted from zakāt.<sup>12</sup>

Zakāt was charged on al-rikāz (buried treasure) at the time of its extraction,<sup>13</sup> on agricultural production at the

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1. Ibid.
  2. Muw.Y., vol.I, p.202.
  3. Ath.Y., p.88; Muw.Y., vol.I, p.1 91; Muw.Sh., p.119.
  4. A. Dā‘ūd, vol.II, p.95.
  5. Muw.Sh., p.118.
  6. Ibid.; Muw.Y., vol.I, p.206.
  7. Muw.Sh., p.114; Muw.Y., p.188; Umm., II, 4, 30, 39.
  8. The reports however tell us that when Mu‘adh b. Jabal (d.18 A.H.) was sent as an administrator and zakāt collector to Yaman, he was instructed by the Prophet about the rate for cows. However, there is no mention of the minimum zakatable number of cows. See Khi.Y., p.83.
  9. Muw.Y., vol.I, p.188; Muw.Sh., p.114. Uwaq is plural of ūqiya that was equal to 40 dirham (see al-Suyūṭī, Tanwīr al-hawālik in the margin of Muw.Y., vol.I, p.188.
  10. San., vol.IV, p.89
  11. Wasāq 60 Sā‘ (See al-Suyūṭī, op.cit.).
  12. Muw.Sh., p.114, Muw.Y., vol.I, p.188.
  13. Ath.Y., p.88, Muw.Y., vol.I, p.191.

time of harvest,<sup>1</sup> on animal properties and on al-‘ayn once a year.

The second question, in this regard, is what the rates were at which zakāt was levied on the different items. The sources confirm that different rates were fixed for different items - 20% on buried treasures<sup>2</sup>, 10% and 5% on agricultural produce<sup>3</sup> and 2½% on al-‘ayn.<sup>4</sup>

As regards animal property different rates were fixed depending on the number of animals. The detailed rates for different animals are given in the following tables. As regards the camel, the following table of rates can be drawn on the basis of all the available reports in our primary sources.<sup>5</sup>

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1. Q. 6:141.
  2. Ath.Y., p.88, Muw.Sh., p.119, Muw.Y., vol.I, p.191..
  3. Muw.Y., vol.I, p.202, San. vol.IV, pp.132-33.
  4. San., Vol.IV, p.89, Mus.H., vol.I, p.184.
  5. These sources have already been pointed out in the introduction. For the details of the rates on camels, see Khi.Y., pp.82-83, San. vol.IV, pp.1-10, Mus.Sh., vol.IV, p.9, Amw., pp.358-78, Mus.H. vol.I, p.184 and vol.IV, pp.290-91, Umm., vol.II, pp.4-5.



CAMELS

Numbers of Animals (both numbers are inclusive)	Rates
1 to 4	Exempted from <u>zakāt</u>
5 to 9	1 sheep/goat
10 to 14	2 sheep/goats
15 to 19	3 sheep/goats
20 to 24	4 sheep/goats
25 to 35 *	1 <u>bint makhād</u> (a female camel which has already completed the first year of its age and has started its second)
36 to 45	1 <u>bint labūn</u> (a female camel, which has already completed two years of age and has started its third)
46 to 60	1 <u>huqqa</u> (a female camel which has already completed three years of its age and has started its fourth)
61 to 75	1 <u>jiz'a</u> (a female camel which has already completed four years of its age and has started its fifth)
76 to 90	2 <u>bint labūn</u>
91 to 120	2 <u>huqqa</u>

\* all the available reports are agreed on the above rates except in the case of numbers from 25 to 35. In a report from 'Alī the rate for 25 camels is mentioned as 5 sheep while the rate for the numbers from 26 to 35 camels was one bint makhād.<sup>1</sup>

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1. Maj., p.90; San., vol.IV, p.5.

As regards the question about the exact rate fixed by the Prophet, in the case when the number of animals exceeded 120 it is hard to determine. Some reports indicate that the rate for a number of camels over 120 was in general a formula that a bint labūn should be levied on every forty and an hugqa on every fifty.<sup>1</sup> But in contrast to this some reports suggest the formula of a hugqa on every fifty animals in number, and in the lesser number the same rates were enforced as mentioned above in the table from the numbers 5 to 45.<sup>2</sup>

As is clear from the table that with regard to camels, particular importance was given to the age of the animal in the fixation of their zakāt rates. Therefore it is understandable, that some complications might have arisen in some cases. In these situations some additional instructions were given to the zakāt collectors. Accordingly in the case when a female camel of a particular age was to be levied on a person, who did not possess it, it was possible for him to give a female camel which was one year older or younger in place of it. However, a principle was used to compensate the loss of the party concerned whereby it was considered that two sheep or twenty dirham were equal to the difference of age of one year among the female camels. Accordingly in the case of giving an older female camel, the zakāt payer was entitled to get this difference from the zakāt collector, and in case of giving a younger female camel

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1. Khi.Y., pp.82-83. San., vol.IV, pp.4-6.

2. Ibid.

(in place of older one) the owner had to give this difference to the collector, in addition to the animals.<sup>1</sup> Another principle of considering an ibn labūn (a male camel of two years of age) as equal to a female camel of one year of age, was also practised.<sup>2</sup>

As regards sheep, the following table can be drawn on the basis of available reports in our sources.<sup>3</sup>

SHEEP

Number of Animals (both numbers are inclusive)	Rates
1 to 39	Nothing
40 to 120	1 sheep
120 to 200	2 sheep
201 to 300	3 sheep
301 and more *	1%

\* The general formula of levying 1% was instructed by the Prophet if the numbers of animals exceeds 300. It means that in effect the last mentioned rate of three sheep will be applied on the numbers from 201 to 399 and four can only be charged on the numbers from 400 to 499.

It should be noted here that in comparison to the rates of

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1. Mus.H., vol.I, p.184; Umm., II, 7.
  2. San., vol.IV, p.4 and Amw., p.954.
  3. Supra, p.57, footnote 5.

other animals and to the rate of al-'ayn and al-harth, the rate on sheep appears to be much lower. Especially in the case when an owner has them in plentiful numbers, the rate becomes only 1%. The reason might have been the fact that sheep give birth to more young than a camel would do. Hence a person who possessed plenty of sheep must have possessed many lambs or younger animals in his total stock. The lambs or younger animals though were counted in the assessment for the purpose of zakāt, but they could not be accepted in payment of zakāt by the collector and only an animal of average age was legally accepted.<sup>1</sup> Therefore it was perhaps to avoid any possible injustice to the zakāt payer that a comparatively lower rate was fixed on sheep.

As regards cows, some reports which are related from Mu'ādh b. Jabal (d. 18 A.H.), an administrator and zakāt collector of the Prophet's time in Yemēn, gives us the information only to the extent that the rate of cows was a tabī'a<sup>2</sup> on every thirty cows and a musinna<sup>3</sup> on every forty.<sup>4</sup> However, we do not know as to whether or not the numbers less than thirty were totally exempted from zakāt.

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1. This practice in the time of 'Umar b. al-Khaṭṭāb eventually caused some complaints from zakāt payers. A zakāt collector tendered his resignation, saying that people accused him of doing injustice by following this practice. See Ath.Y., p.86.
  2. Tabī'a, a young cow, roughly of one year of age, whose horns have become straight. See Mus.Sh., vol.IV, p.14.
  3. An animal of two years of age or more.
  4. Khi.Y., p.83; Muw.Sh., p.119; Muw.Y., vol.I, p.196; San. vol.IV, pp.21-22; Mus.Sh., vol.IV, p.12.

Apart from the rates a general instruction was also given by the Prophet in relation to zakāt on all the species of animals, that very old, defective or very young animals will not be accepted for payment of zakāt nor will those better animals be demanded from the owner which he wished to retain for breeding or other purposes of his own.<sup>1</sup> The Prophet probably thus tried to maintain a balance between the need of payers and recipients of zakāt. Another principle which was operated, possibly to avoid any statistical dispute, was that a mujtama' (a group unit) of animals should not be divided into different sub-groups and nor should different groups be joined together for the purpose of zakāt.<sup>2</sup> This was because there were different rates, as is shown in the above table, not only on different species but on the different numbers of the same species of animal property as well. Another problem in this connection was in the case of khalīṭ, animal property owned by two or more partners where it is not specified which animal belonged to whom. In this case it was quite difficult to determine the separate share of every partner first, and then to levy zakāt. The method adopted in these cases was that zakāt should be levied on the collective stocks and then appropriate shares of it charged from the owners.<sup>3</sup>

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1. San. vol.IV, pp.5-6, Mus.H., vol.III, p.342 and vol.VI, pp.290-91. Mus.Sh. vol.IV, pp. 9, 11, 12, 17.
  2. Ibid., also see Amw., pp.391-93; Umm, II, 13.
  3. Ibid.

The assessment of zakāt according to the above rates probably was not so difficult in the case of al māshiya or al 'ayn but in the case of al-harth (agriculture/ produce), it might have been cumbersome. It is reported that in the case of dates and grapes experts were sent to ~~estimate~~ (takhrīs) the total produce and then zakāt was assessed on the basis of this conjecture, rather than the exact quantity of the crop.<sup>1</sup> To eliminate any possibility of injustice in conjecture, the principle was adopted that a quarter of the conjectured quantity must be first exempted from assessment.<sup>2</sup> Zakāt was collected only when the crop was harvested.<sup>3</sup> According to a report it was possible to give an equivalent substitute for zakāt on grain.<sup>4</sup> Although this report of Bukhārī is criticised by Qaṣṭalānī on the grounds of a disconnection between the transmitters of the report Ṭā'ūs (d. 106 A.H.) and Mu'adh (d. 18 A.H.)<sup>5</sup> However, it seems not improbable in view of the above mentioned cases of levying zakāt on camels, where two sheep or twenty dirhams had been adopted, as a substitute for the difference of one year in

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1. Beside the assessment of zakāt, the method of Takhrīs was also applied in the case of the Prophet's contract of Muqādāt with the Jews of Khaybar. See San. vol.IV, pp.121-26; Amw., pp.481-84; Umm., II, 33.
  2. Amw., p.485; Tay., p.191; A. Dā'ūd, vol.II, p.110; Tir., vol.III, pp.140-41.
  3. Ibid.
  4. Bukh., II, p.302. Cf. Umm., II, 91.
  5. Al-Qaṣṭalānī, Irshād al-Sārī fi Sharḥ al-Bukhārī (Cairo, 1323 A.H.), vol.III, pp.40-41.

the age of female camels.<sup>1</sup>

After the collection of zakāt, its distribution was subject to both local and central control, under the seven heads fixed by the Qur'ān.<sup>2</sup> There is no evidence to the contrary. However, the relative priorities and the amount apportioned to these heads probably was left to the discretion of the local and central leadership. Therefore it stands to reason that sometimes a zakāt collector could return to Medina empty-handed, after distributing all the zakāt fund, as is confirmed by a report.<sup>3</sup> However, they could not have been given a totally free hand in distributing it but they were required to submit their account, though verbally, in most cases. It is confirmed by a report that when Ibn Lutayba was submitting his account, he set aside the articles which he had received by way of gifts and it gave rise to serious criticism from the Prophet.<sup>4</sup>

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1. Supra, p.59.

2. Q. 9:60.

3. It is reported that Ziyād in the time of Mu'āwīya, deputed 'Imrān b. Ḥaṣīn (d. 52) a Companion of the Prophet to collect zakāt from a city in Iraq. When he came back from his task, Ziyād enquired about the funds. Oh you mean the zakat funds, retorted the Companion. Well, I took it in the way I used to do in the Prophet's time and disposed of it in the way I used to do in his time (A. Dā'ūd, vol.II, pp.115-16). Also see the report about Abū Jahīfa. A collector for the Prophet, that he came to the tribe where he was deputed to collect zakāt, he collected and then spent on the poor of the same tribe. Tir, vol.III, p.148.

4. San. vol.IV, p.54; Khi.Y., p.88; Umm., II, 58.

It must be mentioned here that the Prophet never liked to spend anything from the zakāt fund on his kinsmen. It is reported that the Prophet declared several times that sadaqa is unlawful for his family members.<sup>1</sup> He was so conscious of this that he refused to appoint some of his relatives as zakāt collectors. It is because of the fact that the collectors were paid from zakāt funds. He was so strict in this that he even did not allow Abū Rāfi', his mawlā<sup>2</sup>, to act as assistant to a zakāt collector on the grounds 'Mawālī al-qaum min anfusihi'.<sup>3</sup>

There are reports which indicate that some of his kinsmen actually wished to be appointed as zakāt collectors, but he refused saying that "lā tahill al-sadaqa li-āl Muḥammad".<sup>4</sup> Possibly the Prophet's aim behind this was to make an example of ruler before the society and to eliminate any misunderstanding and doubt. This view seems more probable in the presence of a

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1. Ibid., pp.51-52; also see I. Sa'd, I, 390, Mus.H., vol.IX, p.10, vol.XIV, p.178, vol.XV, p.168.
  2. I. Hishām mentioned Abū Raf'ī as one of the mawālī of the Prophet. See vol.II, p.289. I. Sa'd also mentioned that Abū Raf'ī was a mawlā of 'Abbās and he gave him to the Prophet; see vol.I, p.498.
  3. A similar phrase "Inna mawālīnā min anfusinā" is also mentioned in a report of Maymūna, a servant of the Prophet, and the Prophet advised her not to eat anything from sadaqa; I. Sa'd, IV, p.51.  
For the report of Abū Raf'ī, see A. Daud, II, 123; Tir., III, 158-59.
  4. Amw., 329-30.



Qur'ānic verse, in which it is stated: "Some of them accuse you in the matter of the distribution of sadaqāt. If they are given thereof they are pleased but if they are not given thereof they are at once put out."<sup>1</sup> Therefore it seems probable that the Prophet, to eliminate any sort of doubt in this regard, declared sadaqa as unlawful for himself and his family. Anyway it was the result of the Prophet's strictness on this principle that even after his death the members of his family were not only themselves reluctant to accept zakāt but the zakāt fund was considered by the jurists as unlawful for them.<sup>2</sup> And until today some Muslim jurists hold this view.<sup>3</sup>

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This, then, is the detailed zakāt law which was enforced in the later time of the Prophet's life in Medina and the areas governed from there. One could divide this law into two parts according to its components. One part is presented in the Qur'ān. This part comprises the basic concept of zakāt, its compulsory nature, its purposes, the fear of God as a basic motive and sanction for compliance with the law and the

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1. Q. 9:58.

2. See San., IV, 50-53.

3. For the views of the jurists of different schools on this issue see 'Abd al-Raḥmān al-Jazarī al-Fiqh'alā al-Madhāhib al-Arba'a (Cairo, 1970 A.D.), vol.I, p.623.

specification of the heads for the spending of the collected zakāt fund. On the other hand the other part is the one that based and built upon the skeleton, provided in the Qur'ān, and shaped gradually, in the process of its formation as it came into existence and was actually enforced by the government. The first part, though less in terms of volume, deserves to be referred to as the "constitutional part", since it consists of the basic and fundamental principles and forms a real structure for practical zakāt laws. In contrast, the second component is in fact the detailed practical zakāt law of the Prophet's Medina. The first part not only confers coercive powers on the second part on account of its constitutional nature, but goes beyond this. Since it is sanctioned by the Qur'ān, it can be regarded as representing a complete and ultimate sanction of the sovereign power in Muslim society. In contrast, the second part came into existence through the Prophet's leadership of Medina, by which he was not only entitled to legislate through his political power but also on account of his prophetic mission his legislation was regarded as sacred and final for the believers.

In the study under discussion the question which has a particular importance is whether the practical detailed laws of the Prophet, relating to zakāt, referred to above as the second part, have any element of ijtihād in their formation and evolution. If ijtihād really did play any role, then, the question is about its extent and nature. In this regard only the following three opinions are possible:

- (i) The detailed practical laws of the Prophet concerning

zakāt were entirely based on al-wahy al-khafī, a kind of divine revelation that, according to Muslim belief was also revealed to the Prophet, beside the Qur'ān. Therefore the laws have no place for ijtihād in their formation.

- (ii) They were entirely based on the Prophet's own deductive, interpretative and legislative thinking. In this case the laws would be assumed as merely the result of the Prophet's ijtihād.
- (iii) They were the result of a combination and co-relation of al-wahy al-khafī and the Prophet's own ijtihād.

Although none of these opinions can be completely proved or disproved, the first possibility, however, is less likely, since its acceptance leaves us with a very difficult problem of determining, as to why al wahy al jalī was adopted for laying down the principles and general instructions referred to above as the constitutional part and which was treated with extraordinary care and preserved in the form of God's Book, and why al-wahy al-khafī was adopted for revealing all the detailed laws and they were not included in God's Book, if they were completely devoid of the Prophet's own human thinking and wisdom. Therefore we do not find any strong theological reason to eliminate the possibility of an ijtihādic role in the formation and evolution of detailed practical laws of the Prophet.

However, before reaching a final conclusion, it is appropriate to review briefly the various discussions current among the later Muslim jurists in or after the third century A.H.

Almost all the important books on Usūl al-fiqh (Principles of Jurisprudence), contain some discussions on the idea of the Prophet's ijtihād. These discussions generally revolve around the two basic questions. The first question relates to the theoretical aspect of the idea and discussed the point as to whether or not the Prophet might be entitled to carry out ijtihād. While the second question relating to the practical side is, as to whether or not the Prophet actually carried out ijtihād and whether it can be proved by any evidence in this regard. A summary of the opinions and arguments of the jurists in this regard is given below. But it is important to emphasise that there is hardly any jurist who completely denied the grounds for the idea of the Prophet's ijtihād at all. It has been accepted by almost all of them that there is room for the Prophet's ijtihād in non-religious or purely worldly matters, and similarly in general strategy of the battlefields.<sup>1</sup> Thus, in this context, the domain of difference between jurists is restricted only to sharī'a matters (religious or legal). In sharī'a matters as far as defining the object of a Qur'ānic order, dealing with related cases and problems accordingly and the judging of disputes, is concerned the jurists are agreed on the idea of the Prophet's ijtihād.<sup>2</sup> But the disputed question is, as to whether in the new legislation, derivation

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1. For the general acquaintance about the views of the different jurists on the issue, see al-Shawkānī (d. 1250 A.H.) Irshād al-Fuhūl (Cairo, n.d.), pp.238-40.
  2. Ibid.

of the details and branches, and in the formation of implementative details, the Prophet was, in spite of being the bearer of divine revelation entitled to, or actually carried out his own ijtihād. The jurists can be divided into three groups according to their opinions on the issue.

1. The first group comprises those who reject the very concept of the Prophet's ijtihād in the above mentioned matters. According to them, being the bearer of divine revelation, the Prophet is, in every matter guided by and subjected to revelation. There is no need for him to exercise his own ijtihād.<sup>1</sup> This point of view is generally attributed to Ash'arites. However, among the Mu'tazilites Abū 'Alī al-Jubbā'ī (d. 303 A.H.) and Abū Hāshim al-Jubbā'ī (d. 321 A.H.) can also be included in this group.<sup>2</sup> Shawkānī has also added the name of Abū Mansūr al-Māturīdī (d. 333 A.H.) in the above mentioned group.<sup>3</sup>

2. The second group comprises those jurists who accept

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1. For the general acquaintance with this line of argument, see al-Ghazālī (d.505), al-Mustasfā, vol.II, pp.354-58.
  2. See Bihārī, Muḥibb Allāh (d. 1119) Musallam al-Thubūt, vol.II, p.366.
  3. For their views on the issue; see:
    - (i) 'Abd al-'Azīz b. Aḥmad al-Bukhārī (d.730 A.H.), Kashf al-Asrār, vol.III, pp.925-26.
    - (ii) al-'Āmadī (d. 639) al-Ihkām, vol.III, p.140.
    - (iii) Amīr Bādshā, Taysīr al-Tahrīr, vol.IV, p.185.
  4. See Shawkānī, op.cit., loc. cit.

in theory the logical possibility of the Prophet's entitlement to do ijtihād. However, they adopt the stance that there is no absolute evidence to prove that the Prophet actually practised ijtihād. Therefore, on account of this, some members of this group deny completely the practice of the Prophet's ijtihād, while others adopt an uncommitted posture. Ghazālī<sup>1</sup> and Baqalānī (d. 403 A.H.) have taken this latter position.<sup>2</sup>

3. The third group comprises the numerous jurists who not only accept the idea and possibility of the Prophet's ijtihād in theory but consider that there is evidence to prove that such an ijtihād had taken place. This point of view was originally attributed to Ahmad b. Ḥanbal.<sup>3</sup> However, some later writers attributed it to Abū Yūsuf as well.<sup>4</sup> Later Ḥanbalites and most Ḥanafites jurists have also taken this position.<sup>5</sup> Qādī 'Abd al-Jabbār (d. 415 A.H.), Abū al-Ḥusayn al-Baṣrī al-Mu'tazalī (d. 436 A.H.) and some Shafi'ite jurists have also adopted this view<sup>6</sup> and if the

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1. Ghazālī, op. cit., p.357.
  2. Shaukānī, op. cit., loc. cit.
  3. Amīr Bādshā, op. cit., loc. cit.
  4. Al-Qurāfī (d. 684) Sharḥ Tanqīḥ al-Fuṣūl, p.436.
  5. See (i) al-Sarakhsī (d. 438 A.H.), Uṣul, vol.II, pp.94-95.  
(ii) Amīr Bādshāh, op. cit., p.183.  
(iii) Shaukānī, op. cit. loc. cit.
  6. Amīdī, op. cit., loc. cit.

statement of al-Qurāfī is to be accepted then al-Shāfi‘ī himself was in agreement with this view.<sup>1</sup> However, the statements of al-Āmidī indicate that whilst al-Shāfi‘ī accepted the idea in theory, he had not reported any evidence in this regard.<sup>2</sup>

As regards the arguments of the above mentioned three groups of the jurists, the first mentioned group which absolutely discards the idea of Prophet's ijtihād in the legal matters, give many arguments in support of their stand. Their argumentation is mainly based on the following four points.

1. The first point is that the Prophet has a privilege of being guided by divine revelation, and since it is a source of al-‘ilm al-qat‘ī (absolutely correct knowledge), the Prophet does not need in any case to apply his own reasoning and his own human wisdom through ijtihād, which leads on to al-‘ilm al-zannī (probable knowledge). Nor is it permissible for a person to follow uncertain knowledge when there is the possibility of acquiring certain knowledge.<sup>3</sup>

2. The second point of the argument of this group is that if the Prophet was allowed to carry out ijtihād then

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1. Al-Qurāfī, op. cit., loc. cit.
  2. Al-Āmidī, op. cit., loc. cit.
  3. Ghazālī, op. cit., p.355.

he must have applied it in every new case, in which nothing had already been revealed and he should not have waited for revelation, but in contradiction there is evidence which shows that he actually waited for wahy in some cases, and did not express his own opinion or verdict in the matter until a wahy was revealed.<sup>1</sup> The problem of li'ān and zihār are presented as examples in this regard.<sup>2</sup>

3. As a third point, this group presented some Qur'ānic verses in support of their view. In this connection a verse of sūrat al-Najm is cited in which it is stated: "The Prophet does not speak from his own wish but this is a wahy revealed to him".<sup>3</sup> They make this verse general in its application and thus they attempt to claim that every statement uttered by the Prophet is wahy. Thus, since every statement uttered by the Prophet is wahy, no room is left for ijtihād of any kind. Similarly another verse from sūrat Yūnus is cited too in support of the stand: "When our clear verses are recited before them, those who don't expect to face us (on the Day of Judgement) say: bring some other Qur'ān or else amend it - say: I am just

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1. For this pretext and the reply, see al-Ghazālī, op. cit. pp.356-57.
  2. For the general acquaintance with the problem of li'ān, see Q. 24:6-10; Wah. p.181 and Taf., vol.III, pp.355-63. For the problem of zihār, see Q. 33:4, 58:3-4; Wah. p.231, Taf. vol.V, pp.342-55.
  3. Q. 53:3.



a mere follower of the wahy revealed to me and if I disobey my Lord I fear the wrath of the great day of judgement".<sup>1</sup>

It is argued from the mention of "mere follower of wahy" without any change or amendment that there was no room for the Prophet to carry out ijtihād.<sup>2</sup>

4. The fourth argument of this group is that there is no actual report of the Prophet's ijtihād. Therefore, if the Prophet had at any time exercised his own ijtihad, this extraordinary matter must have been related.<sup>3</sup>

In the above-mentioned four arguments, the weakness of the first is obvious from the fact that the concept presented by the Prophet was that he, himself, could not seek to get or succeed in getting a revelation whenever and in whatever matters he wanted. Instead, he had often made clear that it was not in his hands but that it was God who decided to reveal the instructions or Qur'ānic addresses at certain intervals, whenever and in whatever He deemed necessary in the developing events and stages. Therefore nothing at all was revealed about some matters and sometimes the Prophet was corrected by revelation with regard to some actions which he had already taken before.<sup>4</sup> Hence logically there is

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1. Q. 10:15.

2. For this sort of argument, see Ibn Ḥazm (d. 456 A.H.) al-Ihkām fi Usūl al-Ahkām, vol.V, pp.699-703.

3. See Ghazālī, op. cit., loc. cit.

4. For examples, see the verse revealed in the case of the prisoners of war after Badr; Q. 8:67. For this type of argumentation, see Bihārī, op. cit., pp.366-70.

always room for the Prophet to exercise his own ijtihād in all those matters where nothing was clearly revealed to him, even in the matters of the legislation and the derivation or formation of implementative details. As far as the aspect of uncertainty or doubtfulness of the ijtihād results is concerned, the jurists of the second and third group reply that in the case of the Prophet any possible mistake in his ijtihād efforts must always have been corrected by the wahy as actually occurred on several occasions. Therefore all ijtihād results of the Prophet have implicit divine approval.<sup>1</sup>

The second argument of the group based on the Prophet's waiting for wahy in the problems like li'ān and zihār is not sufficient to discard the idea of the Prophet's ijtihād. Since in some matters the reluctance of the Prophet to use his opinion and his preference of waiting for wahy instead, could itself be the result of his ijtihād. Furthermore, the ijtihād process, depending on the nature of the problems, demands patient thought and time.

As far as the arguments of the Qur'ānic verses to discard the idea is concerned, considering the first verse to be generally applicable to every statement uttered by the Prophet is incorrect, in the light of the context in which this verse occurs in Sūrat al-Najm. This verse of the sūra, which was revealed in the middle of the Meccan period,<sup>2</sup> in conjunction with the verses in the

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1. Ibid.

2. For its time of revelation, see I. Sa'd, vol.I, pp.205-6 and Taf., vol.V, p.188.

context, indicates clearly that the verse refers to the Qur'ān, which was presented by the Prophet as divine revelation, and which his opponents alleged to be fabricated by him.<sup>1</sup> Likewise the declaration of the Prophet, in the second verse, that he is bound to follow revelation and has no power to amend or alter the Qur'ān, does not contradict the idea of the Prophet's ijtihād for his ijtihād itself was a form of obedience to wahy. Acting on the basic and constitutional instructions of the Qur'ān, the ijtihadic process of preparation of the details of their application, deduction of branches and the formation of the new laws and regulations within the limits of non-contradiction of the revealed Qur'ān is not an alteration but a form of obedience to the teaching of wahy.

From this viewpoint, accepting the coercive powers of the revealed instructions, there will always remain room for the Prophet's ijtihād.

As far as the fourth argument is concerned, the assertion on which this argument is based is incorrect. Contrary to this argument there are many reports indicating the use of the Prophet's own thinking and wisdom which provide a solid argument in favour of the idea of the Prophet's ijtihād.

As is indicated by the above discussions, those who deny the idea of such ijtihād do not base their stand on any precise

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1. See the verse with its context; Q. 53:1-10.

2. Bihārī, op. cit., loc. cit.

evidence in this regard, or any logical argument. Instead it is based on the reverence which regards everything the Prophet did as being commanded by God and that distinction is forgotten which the Prophet himself explained in his own life. Consequently from this study the conclusion can be drawn that the practical and detailed zakāt law formulated in the Prophet's lifetime reflects the full and effective role of ijtihād in its formation and evolution. Categorisation of wealth as subject to or exempt from zakāt, the fixation of a minimum zakātable amount in different categories of the wealth, the separate and detailed rates for them and other practical regulations and procedures - not one of these is such that it can be considered completely free of any ijtihādic element. Nonetheless, since this ijtihād is attributed to the Prophet, it is natural that a distinction be made between the Prophet's ijtihād and the one which was done by others after his death, on account of sanctity and capability of the mujtahid concerned. Moreover, the non-interference of wahy in the Prophet's final ijtihādic results, being in a way similar to divine approval, entitled them to be considered from an Islamic point of view, absolutely correct and final, since the Prophet's mistakes could be corrected through wahy. Therefore, ✓ all such ijtihādic results which were not corrected by wahy, can be considered, as carrying a sort of divine approval of their correctness. As will be shown in the second chapter, evidences indicate that after the Prophet's death, his ijtihādic results were given the aforementioned status.<sup>1</sup> However, as will be

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1. Infra, ch.II, p. 134.

elaborated later, a subtle but definite distinction was always maintained between the Qur'ān and the Prophet's own ijtihādic results. The latter, though regarded as divinely approved, were not considered to be divinely revealed words as was the case with the Qur'ān.

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After arriving at the above result, now we are left with the third problem of our discussion, proposed at the beginning of the chapter, namely what were the principles of ijtihād and legislation adapted by the Prophet in the sphere of zakāt law and what were the modes and methods of ijtihād, whose practical adaption can be seen in the above-mentioned zakāt laws.

In this connection it is first necessary to trace the substantive sources from which the aforementioned ijtihād and legislation could be deduced or derived. Clearly, the first thing in this regard was the basic constitutional structure of zakāt law which was gradually provided by the gradual revelation of the Qur'ān spread over 23 years of the Prophet's life.

Therefore there is no reason to doubt the question of the Qur'ān being a source of the Prophet's legislation and ijtihād. Here it must be kept in mind that the new society of Medina was basically built on the belief that the Qur'ān, which was presented by the Prophet to the people, was in reality the word of God, who, being sole creator, master and ruler of the universe, is the ultimate legal sovereign power in a Muslim society. Therefore, it would be incorrect to treat the constitutional and basic guidelines contained in His word as merely a source for zakāt laws but, instead, these guidelines must have carried with them coercive

powers and binding force in the formulation of detailed regulations and laws which came into existence through the process of the Prophet's ijtihād.

After the Qur'ān, only the following can be considered as probable sources of the Prophet's zakāt laws.

1. The Prophet's opinion and wisdom
2. Discussion and consultations with the Companions
3. The ancient traditions, legal customs and the ideas of the Arabs
4. External influences.

As far as the Prophet's opinion and wisdom is concerned, it holds the next position to the Qur'ān as a source because without the opinion and wisdom of a mujtahid, it is impossible to envisage any ijtihādic process. Therefore, in the case of accepting the idea of Prophet's ijtihād and its effective role in the formation and evolution of zakāt law, it becomes logically essential to consider the Prophet's own opinion and wisdom as one of the major sources of his ijtihād. However, it must be made clear here that the Prophet's opinion and wisdom as a source of ijtihād is definitely very different in its nature and status from the first mentioned source (which is) the Qur'ān. As we have mentioned above, the Qur'ān was the first independent permanent and basic source which holds coercive and binding powers for the Prophet's ijtihād. In contrast, the Prophet's own opinion and wisdom holds a subjective position before the Qur'ān. In other words the Prophet, through the process of ijtihād, could not, in

any matter, violate the aims and limitations which were already laid down in the Qur'ān. However, no-one should be confused by this into thinking that the Prophet would necessarily have had to refer in every case to a Qur'ānic verse, in order to enforce his relevant commandments in the society. This he did not need to do because the general instruction of obedience to the Prophet had already been given repeatedly in the Qur'ān. However, the subtle distinction which we wish to explain is that, <sup>hand,</sup> on the one / the Qur'ān, which was being recited by the Prophet and which was being preserved through memory and writing, was proclaimed as the very word of God - hence, in the view of Muslim society, it was an absolute and final authority from which springs legality and legal obligation. In contrast to ~~that~~, the Prophet's own opinion and wisdom was a thing from a human being, a prophet of God, a leader of a nation and a practical ruler of the society. However, as such it could also be regarded worthy of respect, obligatory and final for the believers. From this viewpoint, ijtihādī results and legislation of the Prophet were always subservient to the Qur'ān in status, and it was not for the Prophet to make any regulation or rule contradictory to the Qur'ān and enforce it in the society.

As far as the ~~second~~ mentioned possible source "the consultation with the Companions" is concerned we could not find any direct report in this regard except the one which relates the Prophet's consultation with 'Alī on the rate of sadaqat al-najwā.<sup>1</sup> However, we have some reasons to assume positively

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1. Supra, p. 54.



that perhaps the consultation with the Companions was also one of the sources for that ijtihādīc activity, through which the Prophet's law of zakāt was shaped and came into existence. These reasons are as follows.

1. It is mentioned in the Qur'ān regarding the Prophet and his Companions. "Their affairs are settled through mutual consultation".<sup>1</sup> The same instruction was given in sūrat al-ʿImrān to the Prophet, "consult them in matters".<sup>2</sup> In the light of these Qur'ānic verses the report of Abū Hurayra seems most probable that the Prophet used to consult his Companions in most important issues.<sup>3</sup>

2. In the case of some other religious and juristic issues the Prophet's consultation with the Companions is related in some reports.<sup>4</sup> Therefore the consultation in this regard also (in zakāt) seems probable.

3. On the rate of sadaqat al-Najwa the Prophet consulted ʿAlī, as mentioned above.<sup>5</sup> Keeping this in view there seems no reason as to why he would not have consulted them in the purely ijtihādīc matters pertaining to zakāt.

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1. Q. 42:38.

2. Q. 3:159.

3. Umm., VII, 95.

4. For the Prophet's consultation with Companions in the case of adhān, see A. Dāʾūd, I, 134; I. Maja, I, 232.

5. Supra, p. 80.



On account of the above reasons, there is room to assume that the Prophet's consultation with his Companions would also have been one of the sources for the ijtihādīc activity during the Prophet's time. However, the appointment of any formal select committee or consultation group in this regard for the special purpose of the formulation of any law, or the laws is general, can not be proved. What can, however, be proved, is that some older Companions and some distinctive personalities who embraced Islam at a very early stage in Mecca were closer to the Prophet than others and the Prophet often consulted them in matters of importance. Sometimes he accepted their proposals and sometimes he rejected them. Therefore, only this sort of consultation is possible in the case of formulation of the details of zakāt law. From this point of view it is obvious that if the consultation with the Companions is accepted as a source it was merely a source of a secondary nature instead of a major one.

As far as the third and fourth possible sources are concerned, at this stage it can only be said that the concept of levying zakāt, in the words of the Qur'ān, as well, was not an innovation but an instruction which had also been given to the people by all the previous Prophets of God, including Ibrāhīm, Ishāq, Ismā'īl, Ya'qūb, the other prophets of Banī Isrā'īl and finally Jesus himself.<sup>1</sup> Therefore it is not surprising if, in the case of the details and branches of zakāt law, some features might have been

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1. The Qur'ān itself testifies this fact. See Q. 19:31 and 54-55, Q. 7:155-56, Q. 5:12, Q. 2:43.

taken over from the traditions and customs current among the Arabs or in ahl al-kitāb, who were living in the areas surrounding Medina. Moreover, a society, even though changed through fundamental and revolutionary reformation and ideas, preserves some old customs and traditions. Hence a sort of selective and limited adaptation or some kind of external influence is a natural phenomena, and it cannot be logically denied. However, any definite indication of the impact of this sort is not easy to present with any certainty. However, a thorough study of the Prophet's zakāt law forces us to believe that if any adoption or Islamisation actually took place it was a complete success. The practical zakāt law of the Prophet's time presents, in all its details, a systematic and organised picture which shows in its every facet a balance, uniformity and similarity. And nothing seems in it unharmonious or out of place.

It is obvious from the above discussion regarding the substantive sources of the Prophet's ijtihād that the first two sources hold a distinctive position against the other sources, on account of which, both of them deserve to be called major and real sources for the Prophet's ijtihād. Nonetheless, the remaining three holding a secondary position in this regard, should be considered as minor or secondary sources for it. Furthermore, among the first two, the Qur'ān holds central position in comparison with the Prophet's opinion and wisdom. The ijtihādic process of interpretation and application of the general and constitutional instruction, of deduction and derivation of details, and of the new legislation was actually completed through the integration and amalgamation of the Qur'ān and the Prophet's

own opinion and wisdom. The coercive, binding and superior position, however, was held by the Qur'ān in this process.

The second question, after determining the sources is what were the methods, ways and modes, whose adoption in the ijtihādīc activity during the Prophet's time appears in the above zakāt laws. It has already been clarified implicitly through the above discussion that only the following can be regarded as the methods, modes and ways of ijtihād at that time.

1. Interpretation of Qur'ānic verses relating to zakāt
2. Application of the above verses and formation of the details for their application
3. Deduction and derivation of the branches of law
4. New legislation and formation of the laws and regulations within the relevant limits provided by the Qur'ān
5. Selective adoption from the implicit and secondary sources, mentioned above.

However, another vital question that still remains to be discussed is about the major principles which might have been adopted and adhered to, in the process of ijtihādīc/legislative activity concerning zakāt laws. A thorough study of the above zakāt laws leads us to the following principles in this regard.

1. The superiority of the Qur'ān.
2. Emphasis of the aims of legislation rather than

internal literal contents.

3. The principle of gradual legislation.
4. The principle of realism - the legislation was meant to deal with actual events only. Presupposition, speculation and hypothetical issues were excluded from the philosophy of legislation.
5. The principle of natural justice and equity.
6. The consideration of the benefit of individual and public good.
7. Maintenance of a balance within the branches and derivative details of the law.
8. Elimination of hardship.
9. Real emphasis on the ethico-moral aspect of law and adoption of the idea of the individual responsibility before God, as the basic motive.

As far as the first principle of the superiority of the Qur'ān is concerned the entire zakāt law reflects it. The society of the Prophet's Medina was basically built on the belief that God is not only a being who should be worshipped in a religious sense, but also in spite of that He is the absolute ruler, the highest legal power and the final legislative authority. Therefore the Qur'ān, which was being presented by the Prophet was, in fact, the very word of the highest legal sovereign power in the view of society. Hence, it was natural to give it a superior position in every practical legislation. It should be kept in mind that the Qur'ān was providing only general and constitutional instructions in this regard. These instructions, as we have studied

above, were related to the concept of zakāt, its aims and objects, God's fear as a basic motivation for the compliance of laws, the identification of an institution in the practice and specification of the heads of its expenditure. The detailed zakāt laws of the Prophet were actually formulated and evolved under these Qur'ānic guidelines and instructions.

Likewise the study of the above practical laws of the Prophet leads us to the fact that they were not random utterances of an authority but instead they form an organised law and a system of rule motivated by the definite aims in every particle which was related to the central aim of the complete regulation in this regard. Another aspect of the above law comes before us through a comparative study between the Qur'ānic general instruction and the practical details of zakāt law that, the real emphasis and importance was given to the aims and ends of any particular legislation rather than the words or literal formation of a rule.

As far as the third mentioned principle of gradual legislation and enforcement (tadrīj) is concerned, it is clear from the fact that the real major source of the legislation was itself being revealed in fragments and in a gradual process. The Qur'ānic instructions, relevant to zakāt, were also gradually given to the Prophet, starting from the very early days in Mecca till his death at Medina. Therefore the formulation of the implementative details and other relevant legislation was gradually shaped and evolved.

What we exactly mean by the adoption of the fourth principle of realism in the ijtihād and legislation of the Prophet is that from the very beginning, ijtihād and legislation were directly

meant to deal with actual events and problems. Presupposition was basically excluded from the philosophy of the Prophet's ijtihād. Therefore, a legislation on the basis of hypothetical issues, or speculation was completely avoided. We may call it a method of realism. Practically the impact of this method appeared in minimizing the definite limitations of human dealings and in maximizing the independence and freedom for the people's dealings. It appears that this trend was not a matter of coincidence but, instead, it was deliberate in the ijtihādic activity of that time. Apart from the Qur'ānic injunction intending to discourage believers from the habit of too much questioning,<sup>1</sup> an utterance of the Prophet also confirms it: "Leave me as long as I leave you. Too much questioning brought only disaster upon people before you. Only if I forbid your doing anything then do not do it, and if I order you to do something then try to do whatever you can of it".<sup>2</sup> It is supported by another report in which the Prophet even went so far as to hold blameworthy the man whose importune questioning caused the prohibition of what would have been left permitted had he not asked.<sup>3</sup>

The famous phrase about justice and equity that "Justice must not only be done but it must also be seen to be done" presents a concept of natural and social justice. This concept appears as a principle in the above mentioned zakāt laws. Apart

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1. Q. 2:108; 5:101.

2. Ibn al-Qayyim, I'lām al-Muwaqqi'īn, I, p.74. Cf. Musl., Bukh., IX, 290.

3. Bukh., IX, 290.

from the exemption of the goods of personal use from zakāt and the fixing of certain exemption limits for every kind of wealth, it can be seen in the determination of definite rates for different kinds of wealth. For instance, the rate on buried treasure, whose production does not require any labour or requires less labour in comparison to others, was determined at 20%, on agricultural produce, which requires human labour, 10%, and if irrigated by human effort it was reduced to 5%, and the money in circulation which requires not only very hard labour for its production but also the investment of capital, is subject to the lowest zakāt rate  $2\frac{1}{2}\%$ . Furthermore, as we have observed above, in the case of a herd of sheep in possession, which comprises many lambs, which were counted in the assessment but were not acceptable as zakāt payment, the rate is only 1%. That clearly indicates the importance which would have been given to the concept of natural justice and what role was played by it in evolving the law.

Consideration of individual benefit and public good in general also seems to be a principle, applied in the formulation of the above law. Apart from the fixing of exemption limits and rates, the best example for its illustration is that general rule in the case of animal property that very young, very old and defective animals were not to be accepted as zakāt payment, nor those better animals which were specially prepared by the owner for breeding or other purposes of his own. It seems very clear that through this rule an attempt is made to maintain a balance between the benefit of zakāt payers and beneficiaries of zakāt.

As far as the seventh above mentioned principle relating to balance among the different derivative details is concerned, we



have already thrown some light in the above statements. The existence of the central aim and its consideration in every part of the law, the consideration of balance on account of the consumption of human labour in fixing different rates on different kinds of wealth, and a sort of attempted balance in the amounts of rates as well, clearly indicate that the method of balance was adopted as a general principle in the ijtihād and legislation of that time.

Likewise, the elimination of hardship was also one of the principles adopted in the formulation of zakāt laws. A good example of this is the introduction of the rule of acceptance of older or younger animals in the case of non-possession of animals of the age levied on the person, provided that a fixed compensation be given to the party affected by this. In fact, the principle of elimination of hardship emerges from a verse of Qur'ān: "There is no hardship in religion".<sup>1</sup> Probably the report that the Prophet said on one occasion: "create easiness for people and do not create hardship for them"<sup>2</sup> illustrates the above mentioned Qur'ānic verse in this regard.

The ninth of the above mentioned principles relates to the real emphasis on the ethico-moral aspect of the law and the adoption of individual responsibility before God as basic motivation. Although the zakāt law which was enforced practically in the last years of the Prophet's life had undoubtedly a strong

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1. Q.22:78, also see Q.2:286, where it is mentioned "God tasketh not a soul beyond its capacity".

2. Bukh., I, 69 and V, 443; Musl. II, 131-2;  
A. Dā'ūd., IV, 260.



backing from the government for its enforcement and also the warning of the Prophet that non-payers would forfeit half of their properties which would have been considered as a proposed punishment in the case of refusing to pay zakāt. Likewise on receiving false news of the refusal to pay zakāt by Banū Mustālaq the Prophet's sending of a military campaign against them, or according to some reports only his intention to do so,<sup>1</sup> definitely indicate the use of physical force in the enforcement of zakāt laws. However, the development of the concept of zakāt in general, which we have presented in the beginning of the chapter, the Qur'ānic verses in this regard and the relevant Prophetic statements clearly indicate the basically moral and spiritual trend of zakat law and prove that the real motivation and enforcement was fear of God. The warning of wrath for those who indulge in the love of wealth, the concept of purification from the vices by paying zakāt and spending it in the way of God and the promise of reward and success in the hereafter, all point to this. Above all, the word "zakāt" itself in its literal meaning holds a concept of the purification of soul.

#### Concluding remarks

We now sum up the conclusions pertaining to the above discussion in the chapter, as follows:

1. The concept of obligatory help for the poor, orphans and deprived had already been put forward in those Qur'ānic

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1. See I. Hishām, III, pp.340-41.

verses which were presented by the Prophet in the very early days of his prophethood in Mecca as revealed words from God. Under this obligation, not only was it a responsibility of well-to-do people to help the needy and deprived, but urging one another to do so was also a religious obligation. Furthermore it was presented as a rightful sharing of the poor in the wealth of well-to-do people - a rightful share that must be paid and demanded.

2. Fear of God and the concept of individual responsibility before God in the Hereafter, which was being repeatedly stressed by the Qur'ān, was presented as the basic motive and enforcing power for the above obligation.
3. The term zakāt was also current for the above kind of spending at the time close to emigration of Abyssinia. However, another term infāq fī sabīl Allāh was also in use for the above purpose in the same Meccan period. However, we can trace the use of the word sadaqa for this purpose, only in one place - in a Qur'ānic chapter revealed very late in the Meccan period of the Prophet. Therefore, the use of the term sadaqa probably became current in Medina.
4. As regards the heads for spending zakāt, they were already identified by the Meccan Qur'ān in its different verses. However, there is no evidence to prove as to whether or not any system of collection and distribution was adopted in this period. The rates and the fixed exemption limits certainly did not exist in that period. It is possible that in this period the believers would have been spending a part of their wealth privately on the heads already

indicated by the Qur'ān.

5. In Medina, where the Prophet and his followers had the privilege of free society, the adoption of the system of collection and distribution, in order to implement collectively the Qur'ānic instruction in this regard, can be proved. However, the introduction of the system of rates and exemption limits seems a later development, probably in the last few years of the Prophet's life (after the victory over Mecca or at least after Hudabiyya Treaty). Before its introduction the believers had been encouraged to spend more and more for zakāt, sadaqat and infāq fī sabīl Allāh, without any specific rate of any definite regulations. It was also a major source of support for the settlement of Meccan immigrants and for the continuous military campaigns during this period.
6. In the later years of the Prophet's life in Medina, a system of collection and distribution was established with definite zakāt rates, exemption limits and other regulations in this regard. Zakāt collectors were appointed for this purpose in the capital of Medina and for other tribes.
7. Apart from the fixation of heads for spending of the zakāt fund, the Qur'ān, which was presented by the Prophet as the word of God, inclined towards establishing general rules and giving instructions of a constitutional nature in this regard, without indulging in much detail. Therefore, the detailed zakāt laws of the Prophet which were enforced during the later part of his life, had in fact two distinctive parts:
  - (i) The fixed heads of spending the collected zakāt funds,

general rules and instructions pertaining zakāt and the basic constitutional skeleton for it, all of which was provided by the Qur'ān.

(ii) The details and practical regulations that were shaped, evolved and enforced within the limits provided by the Qur'ān.

8. The major and effective role of ijtihādīc activity in shaping and developing the second part, cannot be denied. Although a small group of Muslim scholars in the third and later centuries rejected the idea of the Prophet's ijtihād, however, they do not have strong reasons or sufficient argument to back their stand. In fact a substantial majority of the jurists accept the idea of the Prophet's ijtihād. Our arguments and observations in this chapter confirm this notion.

9. The following two constituted the major and fundamental sources for the above mentioned ijtihād of the Prophet

(i) Qur'ānic general rules and constitutional instructions relating to zakāt (including the fixation of the heads for spending of zakāt collections).

(ii) The wisdom and opinions of the Prophet.

However, the Qur'ān held a binding and superior position in the above two sources. Apart from these major sources, the following should be considered, in this regard, as the secondary or minor sources for the Prophet's ijtihādīc activity.

(i) Consultation with the Companions.

(ii) The old or current traditions, customs and behaviour of Arabs.

(iii) Influence or selective adoption from ahl al-Kitāb, living in the surroundings of Medina.

10. Our study of the detailed zakāt laws in this chapter leads us to the idea that the following methods, modes and ways would have been adopted in the ijtihādīc activity of the Prophet pertaining to zakāt.

(i) Interpretation - of the relevant Qur'ānic texts.

(ii) Application and formation of applicative details - for the purpose of applying the above-mentioned texts.

(iii) Deduction and derivation - from the general rules in the texts.

(iv) New legislation and formulation of regulations - within the limits provided by the Qur'ān.

(v) Selective adaption - from the secondary and minor sources.

11. Our study shows the following principles as well, which might have been adopted or adhere to in the process of the above-mentioned ijtihādīc/legislative activity pertaining to zakāt laws during the Prophet's time.

(i) The superiority of the Qur'ān.

(ii) Emphasis of the aims of legislation rather than internal/literal contents.

(iii) The principle of gradual legislation.

(iv) The principle of realism: the legislation was meant to deal directly with actual events. Presupposition

and speculation on the basis of hypothetical issues were excluded from the philosophy of ijtihād/legislation.

- (v) The principle of natural justice and equity.
- (vi) The consideration of individual and public benefit.
- (vii) The maintenance of a balance within the branches and derivative details of the laws.
- (viii) The elimination of hardship.
- (ix) Real emphasis on the ethico-moral aspect of law and adoption of the idea of individual responsibility before God as the basic motive.

## CHAPTER II

### THE PERIOD OF THE OLDER COMPANIONS (10 A.H./632 A.D. - 35 A.H./656 A.D.)

This second chapter in the study of the development of ijtihād in the evolution of zakāt laws is confined to the period of the first three caliphs (from 10 A.H. to 35 A.H.). Our investigation of this period will be mainly concerned with the following two points.

- (i) The determination of the developing zakāt laws and their applicative details as they were enforced during this time.
  - (ii) A study of the activity of ijtihād and legislation related to the above laws and of the determination of the sources, methods and principles of ijtihādic activity at that time.
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The period of the first three caliphs covers two and a half years for Abū Bakr, ten and a half years for 'Umar and twelve years for 'Uthmān. This period following the death of the Prophet opened a new and rather different era in the history of Muslim intellectual development. Before this period the central position of intellectual and practical guidance among the community was totally occupied by the living personality of Muḥammad, who was regarded as the Prophet of God, and was also the practical leader of the community at the same time. Now, after his death, this

position of leadership was to be occupied either by an individual or a group but neither of these had the sanction of prophethood. Therefore the privileges of infallibility, absolute authority and divine approval over the correctness of personal opinion which were implied in the Prophet's guidance and his legal thought could never be assumed about anyone in the Muslim community after the Prophet's death. What was the impact of this particular aspect of the situation and how did it actually effect the ijtihādic activity in the time of these Caliphs with regard to the development of zakāt laws? And in general what role had it played in shaping and giving a new way or direction to that ijtihādic/legislative activity which was originated by the Prophet himself? These are the questions which logically arise in the following study and must be dealt with. However, there are certain other things which should also be kept in mind.

The first important thing in this regard is the reason that compelled us to call this period "the Period of the older Companions". During all this period the intellectual and practical guidance of the community was retained by al-Sahāba al-Kibār, the older companions of the Prophet.<sup>1</sup> These companions had become

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1. Such as Abū Bakr (d.13 A.H.), 'Umar b. al-Khaṭṭāb (d.23 A.H.) Abū 'Ubayda b. al-Jarrāḥ (d.18 A.H.) Mu'adh b. Jabal (d. 19 A.H.) Ubāy b. Ka'b (d. 19 A.H.) 'Uthmān b. 'Affān (d. 35 A.H.) 'Abd al-Rahmān b. 'Awf (d.32 A.H.) Abū al-Dardā' 'Uwaymer b. 'Amir al-Anṣārī (d.32 A.H.) 'Ubāda b. al-Ṣāmit al-Anṣārī (d. 40 A.H.) Ḥabīb b. 'Adī al-Anṣārī (d. 13 A.H.) 'Abd Allah b. Mas'ūd (d. 32 A.H.) Abū Dharr al-Ghifārī (d. 31 A.H.) Salmān al-Fārsī (d. 36 A.H.) Hudhayfa b. al-Yamānī al-Anṣārī (d. 36 A.H.) 'Alī b. Abī Ṭālib (d. 40 A.H.) 'Ammār b. Yāsir (d. 36 A.H.) Zubayr b. al-'Awwām (d. 36 A.H.) Ṭalḥa b. 'Abd Allah (d. 36 A.H.) and Bilāl b. Abī Ribāḥ (d. 20 A.H.).



Muslims in comparatively ~~early~~ <sup>early</sup> period of Islam and had been consistently present at the side of the Prophet even during the hard and difficult stages of his missionary struggle. Due to their close association with the Prophet as immediate observers of almost every stage of his movement they would have been most familiar with the fervour and spirit of that ideology which enabled the Prophet to succeed in evolving a united and determined nation from the scattered and disunited tribes.

Presumably one of the reasons behind the above situation could have been the preference given to these Companions over others by the Prophet himself during his lifetime.<sup>1</sup> These people, like the disciples of Jesus, appear to have been advisers, partners and policy makers in every matter of importance. Another reason in this regard might have been the fact that all the caliphs of this period belonged to the class of older Companions, therefore the same class, through the caliphs might have incidentally become the focus of political and intellectual activity in the society. This can be discerned very clearly in the time of Abū Bakr and

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1. The concept of "al-‘ashara al-mubashshara" (the ten who had been announced by the Prophet as those who would definitely be rewarded with a place in the Paradise in the Hereafter) itself indicates the view that a few model characters were being pointed out for the future leadership of the society. Moreover, the Qur'ānic concept of al-sābiqūn al-awwalūn also indicates this idea. See Q. 9:100.

'Umar. Both of them as it appears from the reports, usually consulted with the older Companions on almost every matter of policy or administration and generally valued their opinions over those of others.<sup>1</sup> However, it also appears that in the last years of 'Uthmān's reign, a new generation was taking the place of the former. Due to the different factors which had been taking place in this time, it should not be surprising that there existed a kind of gap between the older and younger generation in their ways of thinking and observing matters. Probably this same gap in the thinking of the generations may have been one of the factors which caused the confrontation and, then, the disintegration which eventually resulted in 'Uthmān's assassination and the spread of political chaos.

The second important thing which should also be kept in mind during the study of any legal development of this period is the wave of military campaigns and the victories which resulted in the rapid expansion of the boundaries of the Muslim state. This can be judged from the fact that even during the early part of 'Umar's time by 17 A.H. Palestine and Syria had been conquered.<sup>2</sup> In 20 A.H. Egypt had come under the Islamic domain and by 21 A.H. Persia surrendered after the two great battles of Qādisiyya and Nahrawān.<sup>3</sup> As a result of this rapid expansion of the boundaries, a flood of prosperity and wealth came to Medina and the areas surrounding it. This prosperity would have caused a change in

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1. I. Sa'd, II, 336.

2. Tab., IV, 56-60.

3. Ibid., pp.104-112 and pp.114-139.

the people's way of living. On the other hand, it seems clear that with these military campaigns, Muslim law and its enforcement as far as it had already evolved, would have begun to take place in these new conquered lands. Groups of jurists were not only sent with every military campaign but were also being settled in the camp cities of Kūfa, Baṣra and Fustāt.<sup>1</sup> These people naturally would have been facing new legal problems in the new developing situation and circumstances. They must have been exercising their ijtihād and juristic reasoning to solve these problems. It is also logical that in the process of ijtihād when, on the one hand, they have been teaching a great deal they would also have been learning as well, in the developing situation.

The third significant feature of this time, that should also be kept in mind during the study of this chapter, is the fact that, during all this period, the capital of the state was Medina, the city which itself had witnessed a historical revolution that took place during the decade of the Prophet's leadership. Just after this period the situation had changed and the state's capital was transferred first to Kūfa and then to Damascus. As Medina could never regain the same status, it can be assumed, therefore, that at least in the period of the caliph of Medina, the Ḥijāzī approach and way of thinking dominated the intellectual and legal development. After this time it seems inevitable that dominating position of Ḥijāz must have been affected.

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1. The parent of today's Cairo.

Another outstanding feature of the overall picture of this period is the national unity and the political stability that the community retained till the time of 'Uthmān's assassination. Therefore the positive effects of the unity among the people, and the integration of the society, on the development of ijtihād and legislation can never be ignored. It should be noted that just after the end of this period, the process of disintegration had begun, and a kind of political uncertainty had crept into the society. This disintegration became apparent in the battle of Jamal and Siffīn. In the realm of zakāt laws, this can be discerned through a comment of Ibn Sīrīn (d. 110 A.H.), which is related by al-San'ānī: "In the time of the Prophet, zakāt was handed over, either directly to the Prophet or to the collectors deputed by him. The same practice was continued in the time of Abū Bakr, 'Umar and 'Uthmān. After that, however, it had become disputed as to whom zakāt should be handed over.

The institution of zakāt, its collection and spending on certain heads, which had already been practised and, while passing through the gradual stages of its evolution, had already got a formal shape in the Prophet's time, continued after his death without a considerable change in the way it functioned. However, the brief period of Abū Bakr's caliphate, when several expeditions were being sent out to different parts of Arabia to suppress the tribal revolt of apostates and claimants of a new prophethood, is very important in the history of zakāt laws. It temporarily

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1. San., IV, 47; Mus.Sh., IV, 28; Amw., pp.567-68.

posed a challenge against the existence of the institution of zakāt as a whole.

This challenge was not posed from the above mentioned tribes of apostates or claimants to prophethood, for they should have naturally withheld this payment of zakāt to Medina because of their apostasy and revolt. But the real challenge, in this tense period of turmoil was posed by Banū Kalb and Dhubyān (two tribes to the north of Medina)<sup>1</sup>. They neither joined with the claimants nor did they appear to openly revolt against Islam, but in fact they refused to send their zakāt payments to Medina<sup>2</sup> (perhaps in view of the uncertain condition or doubtful future of Muslims). Banū Sulaym (a tribe to the east of Medina), Hawāzin and Banū 'Āmir (two tribes to the south of Medina) were also reluctant to pay zakāt probably on the same grounds.<sup>3</sup>

These steps which were taken after the Prophet's death by these newly converted tribes, are not at all surprising. In our view it should be seen against the background of rebellion and revolt which had spread in many distant areas, especially in the near north and east, where the new claimants to prophethood had got some hold.<sup>4</sup> Another thing which should not be ignored is

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1. See Tab. vol.III, pp.244-45.

2. Ibid.

3. Ibid., p.242 and p.261.

4. In the near north, Tulayḥa had got some following among the people of Banū Aslam and Tayy. (See Tab. Vol.III, p.242) and in the east Musaylima, joined by a prophetess Sajāḥ, had got some hold in Banū Tamīm and Banū Ḥanīfa (see Tab. vol.III, pp.281-89).

that Arab tribes traditionally were not used to surrendering themselves to any superior government or at least to paying tax to them.<sup>1</sup> Therefore, the doubtful loyalties of these newly converted tribes and the indifferent attitude which they showed by watching the situation and developments, should not be regarded as unusual. It is also not surprising that some tribes would only have refused to pay zakāt, even though they still claimed to be Muslims. However, it appears that these tribes did not in fact totally refuse to pay zakāt, but instead as it appears from al-Tabari that some zakāt collectors who were generally the members of the same tribes where they were deputed, had already collected the outstanding zakāt payment of the year. Now the zakāt fund was with them.<sup>2</sup> Probably the real issue was related

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1. It is a well-known fact that there was no organised government in Arabia. The non payment of tax to any superior government is supported by the fact that Herodotus, an early Greek historian, while mentioning the payment of tribute by the subordinate princes to the emperor of Persia, he makes a mention of Arabs exemption from paying tax to them (see George Rawlinson, ed: History of Herodotus (London, 1862), vol.2, p.401 .
  2. For example see the story of Qays b. 'Amir and Zibriqān b. Badr, two zakat collectors of the tribes of Tamīm. They had already collected zakāt and were now waiting for each other's action in regard to sending zakāt collection to Abū Bakr or otherwise spending it within their own tribes or clans. The former, at last, decided to distribute them among his clans while the latter remained faithful and came with his collection to Medina. The former, however, regretted his action and when 'Alā b. al-Ḥaḍramī came to him, he collected sadaqāt of his region and went with him on Jihād. (See Tab. vol.I, pp.267-68.)

to the dispute of whether or not the supremacy of Medina should be accepted, that is whether the collection should be sent to the centre or at least, with regard to the expenditure of the fund, the instruction from the centre should be followed. This assertion is also supported by a report of 'Amr b. Dīnār (d. 126 A.H.). According to this report 'Umar b. al-Khaṭṭāb once said with much regret that he wished he had asked the Prophet whether or not a war could be waged against those persons who refuse to pay zakāt, arguing that they themselves would spend it on its definite heads. It is further mentioned in the same report that 'Umar, then, stated that Abū Bakr's view in this regard was in favour of a war.<sup>1</sup> Anyway the above mentioned tribes either refused to pay zakāt collectively or they just refused to hand over the fund to the government of Medina. Yet, in every respect this was really a challenge to the institution of zakāt, through which a system of collection and distribution was organised under local and central control. It appears that the question of how the challenge should have been dealt with, was, at the beginning, a matter of dispute among the Companions in Medina, perhaps because the situation actually posed a legal problem. The problem was to determine whether or not a war can be waged against those who neither joined the claimants of prophethood nor openly declared themselves as apostates, but, instead, declared their belief in Islamic doctrines. However, they refused to pay zakāt or to hand it over to the centre. The reports confirm that there was a difference of opinion on this

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1. San., vol.IV, p.43.



legal issue. Mālik related in his Muwatta that 'Umar asked Abū Bakr: "How can you wage war against these people when the Prophet has said that he, who believes in God and in my prophethood, should be spared his blood and property?"<sup>1</sup> It seems that 'Umar was not in favour of war against these people considering the situation at that time. For there was widespread revolt everywhere, while these were tribes who verbally claimed themselves as Muslims, even though they were only nominally under the fold of Islam. 'Umar's interpretation of this situation seems to have made him adopt the above mentioned view. Therefore he quoted the statement of the Prophet in this regard. However, another possibility might be that 'Umar in the presence of the Prophet's clear statement, as seems from his exact wordings, could not really find a legal justification for war against those people who in his view were still believers. Whatever the case may be yet, in the light of repeated Qur'ānic injunctions agimū al-ṣalāt waātū al-zakāt<sup>2</sup> and in the light of emphasis given by the Prophet on performing prayers and paying zakāt, it is quite possible that some Companions might have regarded those who evaded the payment of zakāt as non-Muslims. This view is reported to be held by another prominent jurist of this time, 'Abd Allāh b. Mas'ūd. In a report he declared the non-payer of zakāt was

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1. San. vol.IV, p.43. Mus.H. vol.I, p.67 and 335. Cf. Ibn Kathīr, al-Bidāya wa al-Nihāya fī al-Tārīkh, ed. 'Abd al-Azīz al-Najjār (Riyād, n.d.), vol.IV, p.351.
  2. Supra, ch.I, p.44, f.1.



a non-Muslim, and if a man performs his prayers but evades the zakāt which is due, his prayers would not have any value at all.<sup>1</sup> It appears that Abū Bakr, as the ruling caliph, was also not ready to make any distinction between ṣalāt (prayer) and zakāt perhaps on the same basis of repeated mention of prayer and zakāt together in the Qur'ān. He regarded zakāt as an obligatory duty which must be subscribed to by the people and spent by the government on its specific heads. This is the reason that the reply which was given to 'Umar by Abū Bakr, was: "I will wage war against those who separate prayer from zakāt and I will not condone them even if they exclude an animal which they used to pay to the Prophet."<sup>2</sup>

Undoubtedly it was due to Abū Bakr's ijtihād followed by his swift, successful military action that the institution of zakāt was saved during the period of crisis after the Prophet's death. Probably after observing the result 'Umar would have said as reported by Ṣaḥābī: "God had opened Abū Bakr's heart for war, and now I have found that his view was quite right".<sup>3</sup>

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Another practice of Abū Bakr deserves a prominent place in this study. According to the Muwatta', it is reported by Abū Bakr's

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1. Khi.Y., p.86. Amw., p.354.

2. Muw.Y., I, p.201; San. vol.IV, p.43, Mus.H., vol.I, p.181, p.206, p.260 and p.300.

3. See vol.IV, p.44. These words are also mentioned in the report of Mus.H., vol.1, p.206. Cf. Ibn Kathīr, op. cit., loc. cit.

grandson, Qāsim b. Muḥammad, a prominent jurist of Medina, that Abū Bakr never charged zakāt on māl (properties) before the end of one year of ownership. Furthermore whenever distributing 'atā' he was used to ask the recipient if he had zakātable property. In case the recipient had such property a portion of the 'atā' equal to the zakāt due was retained by him. In the other case the entire 'atā' was handed over to him.<sup>1</sup> This report is not only related by Mālik but also by Ibn Jurayj (d. 150 A.H.) and al-Thawrī (d. 160 A.H.), the contemporaries of Mālik. Their reports are more detailed, as they indicate that Muḥammad b. 'Uqba once acquired a substantial amount of money from his mukātib, a slave who had contracted to pay for his freedom. He asked Qāsim whether he should pay the zakāt on the above amount immediately or he could wait for the passing of one year. Qāsim informed him of the above mentioned practice of Abū Bakr.<sup>2</sup> Besides the above report, Ṣan'ānī also related through Ibn Jurayj another report from Jābir b. 'Abd Allāh (d. 73 A.H.) concerning Abū Bakr's practice in this regard: "When a large amount of wealth was sent to Abū Bakr by 'Alā Ibn al-Ḥaḍramī,<sup>3</sup> he announced in public that whoever had any outstanding debt owed by the Prophet or who had any promised liabilities from him, should come to him. Jābir came and reminded him of the promise which the Prophet had made to him. Therefore,

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1. Muw.Sh., p.115, Muw.Y., vol.I, p.189.

2. San., vol.IV, pp.75,76.

3. The Prophet's administrator in al-Bahrayn see Watt, Muḥammad at Medina, p.132.

Abū Bakr paid him an amount which was over 1500 dirhams. Jābir mentioned that at the time of giving this money Abū Bakr said to him that no zakāt was required to be paid by <sup>him</sup> until one year of ownership of the money had passed.<sup>1</sup>

This principle of Abū Bakr, regarding a full year of ownership for the purpose of obligatory zakāt illustrates his ijtihādī action in this regard. Actually this principle was a form of interpreting, applying and deducing from the original practice of the Prophet's time, as zakāt on al-māshiya and on al-‘ayn was levied only annually by the Prophet. Abū Bakr adopted this practice in a manner that exempted the owner from paying zakāt for his new possession until the end of a full year of its ownership.

As reported in the Muwatta’, this practice continued in the time of ‘Uthmān,<sup>2</sup> therefore, it can be assumed that this principle of not levying zakāt on a new possession until the end of a full year of its ownership would have also been practised in the time of ‘Umar. However, it is reported about ‘Abd Allāh b. Mas‘ūd, a zakāt and state treasury officer in Kūfa at ‘Umar's time, that when the annual salaries for the people were paid by him he had deducted zakāt from them.<sup>3</sup> However, it could have been the outstanding zakāt which he used to deduct. This view can also be inferred from another report which shows that ‘Abd Allāh b. Mas‘ūd

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1. San., vol.IV, p.78.

2. Muw.Sh., 115. Muw.Y., I, 189. cf. San., IV, 77. Amw., 412.

3. San., IV, 78.

once clearly declared: "No zakāt is required on the person who receives in his hands a new possession of wealth until a full year has elapsed from it".<sup>1</sup> It appears that the above principle continued to be observed at the time under discussion in this chapter. However, several questions arose in this regard at the time of the successor jurists and a difference of opinion appeared later on in the application of the above principle that will be discussed in the relevant chapter.<sup>2</sup>

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After Abū Bakr, 'Umar's ten years of rule is very conspicuous for the new ijtihādāt which were exercised in his time on many legal issues including the zakāt laws. Hence it deserves particular attention in our study. During this time the problem of including horses among the zakātable livestock was an outstanding issue. As has been mentioned in the first chapter, the Prophet had already exempted horses and slaves from zakāt. This animal had been kept and used in Arabia since earliest times and owning a horse was regarded as a sign of prestige, horses were used for the purpose of warfare or convenience in fast travelling. However, these animals were not generally reared or bred by the common people. Instead they usually reared camels and sheep for their purposes, such as trading, skin and woollen dress-making and for

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1. Amw., pp.412-13.

2. Infra, ch. IV, pp. 189-203

food. Probably the rearing of camels and sheep was also considerably easier for them. The countryside provided these animals with pasture and the places for living. However, the provision of horses needed better food and special stabling that was not easily available for Arabs in the conditions they lived at that time. This animal was not then considered as a basic for the common people. Only a small number, hardly 5% of the population, would have possessed them. The exigencies of the Prophet's time had made the demand for horses more important on account of the state of war and their struggle in self-defence. Therefore the Muslims, in this new situation, were instructed and encouraged by the Qur'ān to own horses for the above mentioned purposes.<sup>1</sup> Probably for the same reason, the horses had been totally exempted from zakāt by the Prophet in several statements.<sup>2</sup> Horses continued to be exempted in the time of Abū Bakr, and in the beginning of 'Umar's time as well. However, towards the middle of 'Umar's time the situation was again different as a result of the conquest of Syria and Palestine. Horses in these regions were reared and bred on a large scale for the purpose of trade and it was a big business there, involving the great traders of the region. Therefore, the question arose as to whether or not zakāt should be levied on these animals which had become a major source of income through their breeding and trading. However, it is strange to note that the issue was not

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1. Q. 8:60.

2. Muw.Sh., 118. Muw.Y., I, 206. Khi.Y., 83. Ath.Sh., 97. San., IV, pp.33-34.

initiated by the government but it was first put up by the people and traders themselves. They insisted that zakāt should also be levied on this property of theirs. But Abū 'Ubayda b. al-Jarrah the zakāt collector in Syria was reluctant to act on this matter.<sup>1</sup>

According to the Muwatta' he wrote to 'Umar in Medina seeking his advice on this issue. 'Umar hesitated at first and probably on the basis of the Prophet's clear exemption rejected the idea of levying any zakāt on horses. However, this argument did not satisfy the people's requests in this regard. Therefore Abū 'Ubayda wrote again to 'Umar. Hence, after consultation with the other Companions, 'Umar eventually approved the idea of levying zakāt on horses.<sup>2</sup> The details of this consultation are related in San'ānī's reports. According to them 'Umar first adopted the instance "mā urīd an ākhudh shay' lam yakun qablī", (that I am not ready to levy any such thing which was not levied before me). However, he consulted the Companions later on, when 'Alī suggested that if the public is voluntarily ready he should fix a rate on their horses provided that it should not be considered as prescribed tax for ever which should be continued after him.<sup>3</sup> What the views of the other Companions were in this regard is not known. What is known to us is that 'Umar, ultimately levied zakāt on horses at the rate of ten dirham per horse.<sup>4</sup> It also

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1. Muw.Y., I, 206. Muw.Sh., 118, San., IV, 35.

Cf. Mus.H., I, 250.

2. Muw.Y., I, 206. Muw.Sh., 118.

3. San., IV, 35.

4. Ibid.

appears that a similar situation in Yemen also contributed to build up 'Umar's view in this regard. It is reported that 'Abd al-Rahmān, the brother of Ya'la b. Umayya, the zakāt collector of al-Janad<sup>1</sup> in Yemen bought a female horse for 100 qulūs. Later on the sale resulted in a dispute between the seller and buyer and the news eventually reached 'Umar. In response, 'Umar called on Ya'la in Medina and when he learnt that horses were traded in Yemen and were a valuable and precious property, he expressed his surprise and said, "We levy zakāt on forty sheep and we don't levy anything on these valuable horses".<sup>2</sup> It is also reported that 'Umar then instructed Ya'la that he should charge zakāt on horses at the rate of one dīnār (probably one dīnār was equal to ten dirhams) per horse.<sup>3</sup> This new development of ijtihād is important in the sense that in spite of the Prophet's exemption of horses from zakātable livestock they were included in it. However, the intention behind this ijtihād was not to reject completely the Prophet's law but to pay more attention to the spirit and purpose of the law rather than the literal wording, applying flexibility to the law in the light of new circumstances. This assertion is also supported by the views expressed later on by Zayd b. Thābit (d. 45 A.H.) and 'Abd Allah b. 'Abbās (d. 68 A.H.). Both were younger but mature

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1. Ya'la was deputed to al-Janad as a zakāt collector by the Prophet himself (see Tab., vol.III, p.228). 'Umar b. al-Khaṭṭāb probably deputed him in his time to some coastal town, see Khi.Y., 76.
  2. San., IV, 36.
  3. Ibid.



Companions at 'Umar's time. On being asked: "Did not the Prophet exempt the horses from zakāt?" They replied: "Yes but it was the horse of a ghāzī (soldier) or a rider."<sup>1</sup>

It appears that in the later time of 'Umar the practice of levying zakāt on horses had become established in several parts, in Yemen as well as in Syria. This assertion is supported by the different reports in this regard. Ibn Jurayj mentioned a report that Sā'ib b. Yazīd, a zakāt collector, would bring the zakāt horses to 'Umar.<sup>2</sup> A similar practice is reported in connection with the Yemeni zakāt collector Ya'lā b. 'Umayya.<sup>3</sup> This practice, as it is confirmed by a report, continued in the time of 'Uthmān as well,<sup>4</sup> but it appears that in the presence of the Prophet's clear exemption, this cautious ijtihād could not obtain wide acceptance later among the Successor jurists. Probably for this reason 'Umar b. 'Abd al-'Aziz in his time issued an order that zakāt should not be levied on horses.<sup>5</sup>

Apart from the levying of zakāt on horses, another development of 'Umar's time was the inclusion of al-'adas and al-hummuṣ (lentils and <sup>chick</sup>peas) in the zakātable categories of agricultural produce. Wheat, barley, dates and grapes or raisins were practically the only zakātable agricultural produce in the Prophet's

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1. For Ibn 'Abbās see Amw., 464. For Zayd B. Thābit see Zayl'ī, Naṣab al-Raya (Beirut, 1393 A.H.), vol.II, p.357.
  2. San., IV, 36.
  3. Ibid.
  4. San., IV, 35.
  5. Infra, ch.IV, pp.213-4



time.<sup>1</sup> It is possible that lentils and <sup>chick</sup>peas were not generally produced on a big scale in that time and hence the question of zakāt on them would not have arisen. Probably this question arose in 'Umar's time and, then, as it appears from a report of his grandson, Sālim, zakāt was also levied on al-qitniyya (peas and lentils).<sup>2</sup> Therefore the inclusion of these vegetables in the zakātable categories of agricultural produce should also be regarded as a new ijtihād of 'Umar's time. However, in this regard any sign of hesitation, disagreement or any consultation with the other Companions cannot be traced in our sources. Probably the reason was the presence of the inclusive Qur'ānic statements and the utterances of the Prophet demanding the people to pay haqq or zakāt from their agricultural produce in general.<sup>3</sup> Therefore the inclusion of the above mentioned vegetables in the agricultural produce was just a logical and simple result of the interpretation or the application of the existing law in the new situation. Since there already was a rate from the Prophet's zakāt legislation for wheat, barley, dates and grapes, there was no need to introduce a new rate for them, and the new situation would not really have posed a serious problem that could cause any initial hesitation or disagreement among the Companions in this regard. However, it is rather an interesting thing that even

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1. San., IV, 119. Amw., pp.468-69.

2. San., IV, 120.

3. See Q. 6:41. For the Prophet's general statements on this regard see San., IV, pp.133-34, and Amw., p.476.  
Cf. Khi.Q., pp.115-17.

this matter had ultimately become a point of disagreement among the Successor Jurists in the later time. A few of them in the case of agricultural produce appeared to insist that zakāt should be levied only on those kinds of grain which were actually levied by the Prophet himself in his own time.<sup>1</sup> It clearly shows a changing trend in the later period towards rigidity, immutability and strictness in the literal following of the Prophet's utterances and his practices. The cause, nature and details of this changing trend will be discussed in the third chapter relevant to "the Successor Jurists".

In addition to the above vegetables, some reports confirm that in 'Umar's time zakāt was also levied on olives.<sup>2</sup> But all other fruits and vegetables, which were not generally produced on a large scale till that time or were perishable, remained exempted from zakāt.<sup>3</sup> Likewise zakāt was also levied in 'Umar's time on amber, a sea product. Abū Yūsuf mentioned a report in his K. al-Kharāj that Ya'fā b. Umayya, a zakāt collector,<sup>4</sup> once wrote to 'Umar asking about the case of a man who had found a valuable amount of amber on the sea shore, whether or not zakāt will be levied on it. 'Umar, then, replied to him "innahu sayb min sayb Allah"<sup>5</sup> that it is a gift of God, and all the things of this sort

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1. For the different views of the Successor jurists on the problem, see Amw., pp.469-75, and San., IV, pp.115-16.
  2. Mus.Sh., IV, 20.
  3. San., IV, pp.118-19.
  4. This zakāt collector was deputed by 'Umar to some coastal area. Supra, p.112.
  5. Khi.Y., 76.

which are thrown away by the sea itself should be charged under the rate of khums (20%).<sup>1</sup>

Another ijtihādic development of this time could be traced in the case of zakāt on honey. As we have already mentioned, in the first chapter, some reports take the fixing of 10% zakāt on honey back to the Prophet's time.<sup>2</sup> If these reports are assumed to be correct, then at least in this case it was a new development of 'Umar's time that a difference was made between the honey collected in mountains and that obtained from the plains.<sup>3</sup> A rate of 'ushr (10%) was fixed for the first mentioned while the later was subject only to a rate of nisf al-'ushr (5%).<sup>4</sup> Perhaps this difference was based on the same principle of giving an advantage to the people on the basis of their labour and the cost of production which also appears to have been considered by the Prophet himself in the fixing of different rates for agricultural produce. The produce of those lands irrigated by the natural resources were subject to the rate of 'ushr (10%) while the produce of other lands which were mostly irrigated by the artificial resources were subject to the rate of nisf 'ushr (5%) only.<sup>5</sup>

It can be adduced from the above that a method of application of the rule of a particular legal case to another new developing case on the ground of some close similarities between the reason

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1. Khi.Y., 76.

2. Supra, ch.I, p.56.

3. Amw., 498.

4. Ibid.

5. Muw.Y., I, 202; San., IV, 132-3.

of the two, though in its very early stages, was being adapted during that time. This formative shape of the above method was perhaps further developed and gradually refined later on and ultimately evolved in the form of qiyās (analogy), which was an important method of ijtihād prevalent in and after the middle of the 2nd century A.H.

Another innovation of 'Umar's time was the appointment of 'āshir (tax collector) on many important trading routes to collect the prescribed rates. As they were instructed to collect jizya from the non-Muslims, similarly they were also instructed to collect zakāt from the Muslim traders.<sup>1</sup>

Another important development that took place in 'Umar's time was the punishment which was prescribed for the person who dishonestly conceals a part of their actual possession from being assessed in zakāt.<sup>2</sup> A fifth (20%) portion of the total property of the criminal could be seized as a penalty.<sup>3</sup>

As far as the Prophet's time is concerned no practical enforcement of a definite punishment in this regard can be proved. However, a report indicates that on one occasion, when zakāt was declared as an obligatory duty of the Muslims by the Prophet, he also said in this context, that he who pays will be rewarded by God, however, he who will be found concealing his wealth from fear of paying zakāt, I will seize half of his total property.<sup>4</sup>

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1. Ath.Y., 90; Ath.Sh., 98-99; San., IV, 88; Amw., 533.

2. San., IV, 19.

3. Ibid.

4. San., IV, 18.

But, had this penalty ever been in fact enforced during the Prophet's life time? There is no evidence for this. The only event which is reported in this regard was the case of Abū Jahm, Khālīd, and 'Abbās, when the Prophet was told about their refusal to pay zakāt. The first two were deliberately ignored by the Prophet considering their hardships and circumstances but the Prophet declared that 'Abbās, who was also his paternal uncle, would have to pay the zakāt due and the equivalent amount in addition.<sup>1</sup> The additional equivalent amount may be considered as a penalty which was, in this case, imposed by the Prophet. It is not known, however, whether the case of 'Abbās was earlier or the above mentioned utterance of the Prophet regarding the forfeiture of 50% of the property. In any case, the forfeiture of 20% of the total property can only be assumed as a new ijtihādīc development of 'Umar's time. Another factor in this regard should also be kept in mind, namely that the society of Medina was built on the basis of the fear of God. The same fear had been working as an incentive or as a binding force behind the practical laws. Therefore it is quite possible that in the brief period of the last two or three years of the Prophet's life when the zakāt laws with <sup>their</sup> definite rates were effectively introduced, at first the people in general would not have been fraudulent or dishonest in declaring their properties for the purpose of zakāt and hence a need of a fixed punishment in this regard might not have arisen yet. But it is obvious that for the enforcement of a practical law, the ideal situation of voluntary obedience can never remain

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1. San., IV, 18. Cf. A. Dā'ūd, II, p.115.

for a long period. Ultimately the enforcement of the law tends to a practical and worldly punishment for the purpose of obtaining its proper observance and due respect in the society. The proposed warning of the 50% forfeiture by the Prophet himself was, perhaps, a step in this direction. In Abū Bakr's time, however, much emphasis was given to suppressing the claimants of new prophethood and to re-establishing control over those tribes who had refused to pay their zakāt to Medina. Therefore, even in Abū Bakr's time a real stage of effective legal punishment for the individual evader of zakāt could not have been reached. It was in fact the established period of 'Umar when a definite legal punishment was needed. However, in this time, the penalty which was actually legislated and enforced was not the forfeiture of 50% property, as was proposed by the Prophet but instead it had been reduced to a 20% forfeiture of the evader's total property.<sup>1</sup>

It appears that on the one hand, 'Umar intended to strengthen the respect for law by introducing a legal provision of penalty and on the other hand he was very cautious of the danger of hard and fast application of the law in the society, that, in some cases, could cause some hardships and injustices for the people. Probably a basic principle, that was followed in this regard, was that all the incentives, which might lead men to any act of dishonesty, should be removed first, by giving them the maximum possible flexibility in applying the law, but even after this, if a person <sup>was</sup> found guilty, due to his evil nature then a

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1. San., IV, 19.

deterrent punishment should be there to deal with him.

What flexibility was given to the people in 'Umar's time and how the law of zakāt was being applied for that purpose, can be judged from the instructions which were repeatedly given to the zakāt collectors, that an animal of average quality should be accepted in payment of zakāt and their best or well-bred animals should never be demanded as part of the payment of zakāt.<sup>1</sup> Mālik relates that once 'Umar saw a well-bred sheep with big udders, when he knew that it was taken in zakāt, he regretted it and expressed the view that the owner might not have willingly offered it in zakāt. He then instructed: "Do not put people on trial and do not demand from them their best animals which they have spared or retained for their own special purposes. In this regard al-rubā (an animal with young), al-mākūl (a pregnant animal) and al-akūla (well-bred fleshy animal) were prohibited in general from being demanded in zakāt. Another instruction of 'Umar in this regard to zakāt collectors is related by al-Ṣan'ānī that before selecting zakāt animals from livestock, the owner must be given first an option to exclude his best animals to a limit of one third of his total stock and then the collector should select the zakāt animal of average quality from the remaining two thirds.<sup>4</sup> Similarly, 'Umar is reported to have written in a letter to his

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1. For the general instruction see Muw., I, 199-200; Ath.Y., 86; Ath.Sh., 102; San., IV, 15-17.
  2. Muw., I, 200.
  3. Ibid., p.199; Ath.Y., 86; Ath.Sh., 102.
  4. San., IV, 15.



zakāt collectors that the men with their cattle should not be assembled for the assessment of zakāt, except in a place which should be convenient and in their best interests.<sup>1</sup> He also advised in the letter that for the above purpose, the assesseees of a region with their cattle should not be bothered by calling them to assemble in one specific place at one time, but instead they should be called on in groups, one at a time.<sup>2</sup>

In the historic year of al-Ramāda (drought)<sup>3</sup> the postponement of zakāt collection for one year can also be regarded as an outcome of the same policy of 'Umar.<sup>4</sup> Likewise, in the case of an orphan there was a danger of the property being consumed by the annual levy of zakāt before the orphan reached his maturity. This made 'Umar instruct the guardians of the orphans to invest their properties in some paying concern so that the property could provide for the zakāt rates without being exhausted.<sup>5</sup> At the same time 'Abd Allah b. Mas'ūd, a famous jurist and zakāt executive appointed by 'Umar in Kūfa, exempted the properties of orphans from zakāt till the time of their maturity.<sup>6</sup> From the above examples one can easily judge how much importance during this time was being attached to the outcome and results of the implementation of the law, rather than its literal or rigid application. One can

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1. San., IV, 17.

2. Ibid.

3. According to al-Tabarī, it was 18 A.H. See, Tab., IV, 96.

4. Amw., 374.

5. Muw., I, 192. San., IV, 68-9.

6. Ath.Sh., 94.



also discern from the above the role which natural justice actually played in the implementation of the law and its application.

As far as the disbursement of zakāt collection is concerned, it was being spent under central and local control on those definite heads which were specified by the Qur'ān as was also the case in the Prophet's time. However, any definite proportion being spent in the central and local disbursement cannot be traced from our sources. Probably the amount of the collection which was surplus to local requirements would have been sent to the centre. Some reports confirm that sometimes the zakāt collector returned to Medina empty-handed after disbursing all the collections on local requirements.<sup>1</sup> However, after the year of al-Ramāda (drought), when the collection of zakāt was postponed for a year and was collected in the following year for the previous two years, 'Umar instructed the collectors that they should spend one year's zakāt on the local requirements and the rest be sent to the centre.<sup>2</sup>

Zakāt funds were also reportedly spent on non-Muslim beneficiaries by virtue of their being destitute (masākīn).<sup>3</sup> Although this seems a rather new development of this period, there does not seem to be any legal hindrance because, not only did there already exist the head of mu'allafa al-quḷūb (those in whom inclination towards Islam is to be strengthened or created), but in general the major head of al-fuqārā' wa-al-masākīn (poor and

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1. San., IV, 13.

2. Amw., 374.

3. Al-Balādhurī, Futūḥ al-Buldān, p.135. Khi.Y., 136.

needy people) could also be interpreted to imply non-Muslim destitute as well. It was in fact just a matter of applying and interpreting the law to the current situation.

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Another problem in this regard was the prohibition of spending the zakāt fund on the āl (family members) of the Prophet which was prescribed by the Prophet himself declaring "lā tahill al-sadaqali āl Muhammad".<sup>1</sup> With the possible intention of eliminating people's doubts and misunderstandings concerning the spending of the zakāt fund, the Prophet, perhaps, wanted to make an example for a ruler or leader of Muslim society.<sup>2</sup> However, the above statement of the Prophet was interpreted by the later jurists as a permanent prohibition for giving away any zakāt fund to the Prophet's āl (descendants). However, it can be inferred from a report of the Muwatta that, at least in 'Umar's time, the case was not interpreted in this way. According to the report, 'Umar, on being asked (probably at the time of al-Ramāda) about a blind she-camel, issued an order that the animal be sent to the Prophet's widows. On it being pointed out again that it was blind and so what would they do with it, he insisted that the animal could be used by them for the purpose of breeding. On being told again that being blind how would it be pastured, then, 'Umar asked the people whether this animal belonged to jizya or

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1. San., IV, 50-1.

2. Supra, ch. I, pp. 65-6.

sadaqa. After being told that the animal was from jizya, 'Umar said that perhaps they were intended to eat her. The reporter himself confirmed that he had explained to 'Umar that the animal really had a sign of jizya on her leg, then, 'Umar ordered the animal to be slaughtered. The best portion of the meat was sent to the Prophet's widows, and the rest was shared by 'Umar and his colleagues including both Muhājirūn and Anṣār.<sup>1</sup>

In this report it is very clear that 'Umar in the first instance without asking about whether the animal was collected in sadaqa or jizya, ordered it to be sent to the widows of the Prophet. It can be inferred from the incident that 'Umar had not considered the zakāt fund as proscribed for ever towards the Prophet's āl which included his widows, for if he had considered it so he must have asked for clarification with regard to its collection at the first instance as he did afterward. It can also be assumed that the utterance of the Prophet in this regard was perhaps interpreted by 'Umar as <sup>a</sup>model example for a Muslim ruler. That is why before ordering the slaughter of the animal, he first investigated the nature of its acquisition, being concerned about the improper use of a zakāt animal. Furthermore, in another report of the Muwatta', 'Umar once drank the milk of a zakāt animal by mistake and when he realised that the animal was from zakāt he deliberately vomited by forcing his fingers in his mouth.<sup>2</sup>

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1. Muw.Y., I, 207.

2. Muw.Y., I, 201.

In the above, the development of zakāt laws in 'Umar's time has been discussed in details. Let us now turn to the time of the third caliph, 'Uthmān. What was the actual development in his time that took place in the realm of zakāt laws? Our sources have comparatively less material and reports to answer this question in detail. The reason might be that the zakāt law had already been evolved in a well-organised and elaborate shape in the period of 'Umar. The major part of the expansion of the law had already been completed. Furthermore, in comparison to 'Umar's time no remarkable change took place in 'Uthman's time that could cause the need for some new or vital ijtihādic problems to be solved. Therefore it is quite possible that in 'Uthmān's time no further important advance in ijtihād was made at all - and hence comparatively less reports could find their place in circulation among the later Successor Jurists - from whom the compilers and authors of our sources derived their information.

However, the historical sources confirm that a significant feature of 'Uthmān's time was the affluence of society that had then reached its climax.<sup>1</sup> Historians generally interpret the situation as an outcome of the successful military campaigns and the rapid expansion of the boundaries of the state. The underlying factor in this situation that improved the economic well-being of the general public thus strengthening the purchasing power of the common man seemed to be ignored by the historians. In our view there is ample room to assume that zakāt law was one

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1. Al-Suyūṭī, Jalāl al-Dīn, Tārīkh al-Khulāfā', (Delhi, 1345 A.H.) pp.116-7.

of the main factors which caused the wide-spread circulation of wealth, its expansion and its use as an instrument of productivity. Since the decade of 'Umar's rule had provided a sufficient period for the law to manifest its impact on the society, therefore the results of zakāt law ought to have appeared in 'Uthmān's time.

However, keeping aside the question of what role was actually played by the enforcement of zakāt law in creating the affluence among the society, it appears that in this era of prosperity some new problems relating to loans or debts arise in the zakāt law. For example, in the case of the property which included the debts which were owed should the zakāt be levied on the entire amount or the debt be subtracted first before charging zakāt? Similarly, should someone who has given a loan to others be charged for the amount before or after the loan has been returned to him? If he is charged zakāt after the repayment of the loan, then, in case the loan is returned after several years should he be charged for all those years or only for one year? It is quite possible that it was to avoid such complications that 'Uthman adopted the practice of urging people during the month of zakāt collection to repay their debts so that an accurate assessment of zakatable property could be carried out.<sup>1</sup>

However, it is obvious that this practice of loan repayments was not always practicable in all cases nor was it a real solution of the actual problem. Consequently, these problems must have given rise to contemporary ijtihādīc activities.

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1. Ath.Sh., 94; Muw.Sh., 114; Muw.Y., I, 193.

With regard to the first of the above mentioned questions, there seems to be agreement that the loan which was owed must first be subtracted and zakāt should be charged only on the remainder provided that the remainder is greater than, or equal to the minimum amount that is subject to zakāt. The same view can be inferred from the above mentioned practice of 'Uthmān. Scope for drawing the same conclusion, before 'Uthmān, was also provided in the practice of 'Umar which is reported by Ṣan'ānī.<sup>1</sup> On being questioned by a person who kept a current ledger and account as to whether he should pay zakāt immediately on his entire possessions at the time of zakāt collection while he will have to repay his debts and to bear his family expenses, 'Umar replied that there was no need to hurry but before paying zakāt he should assess his borrowing and lending and estimate his subsequent family expenditure as well.<sup>2</sup> The similar view is also reported to be held by 'Alī<sup>3</sup> and 'Ā'isha.<sup>4</sup> Later, in the time of the "Successor Jurists" this stand was also favoured by 'Aṭā b. Abī Ribah (d. 114 A.H.)<sup>5</sup> and Tā'ūs (d. 106 A.H.)<sup>6</sup> from Mecca and by Ibrāhīm Nakha'ī (d. 95 A.H.) in Kūfa.<sup>7</sup> Later on, this view is also supported by Abū Ḥanīfa<sup>8</sup> and Sufyān al-Thawrī<sup>9</sup> and by Mālik (d. 179 A.H.)<sup>10</sup> in Medina. It is very important to note that the

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1. San.IV., 102; Mus.Sh., IV, 32.

2. Ibid.

3. Maj., 95.

4. San., IV, 100.

5. Ibid., 71.

6. Ibid., 93; Mus.Sh., IV, 50.

7. Ath.Sh., 95.

8. Ibid., 94.

9. San., IV, 93.

10. Muw.Y., I, 192.

jurists of different times and areas were in agreement on an issue where no direct statement of the Prophet can definitely be traced. Probably the Qur'ānic principle of al-'afw<sup>1</sup> was at work as a basis for this agreement. Under this principle the only part of a man's wealth which was liable to be demanded was al-'afw - the part surplus or in excess of one's own essential needs. It is a principle that can also be regarded as a leading principle in the fixing of the minimum zakātable limits for different properties and in the various rates for the specific varieties of wealth which were formulated in the Prophet's lifetime.<sup>2</sup> Therefore, it was expected by the same token that the debts owed must first be excluded and the rest should be assessed whether or not it is zakātable under the provision of the minimum zakātable limit.

As far as the second question is concerned, namely if someone had given a loan to others, should he be charged for the amount before or after the loan has been recovered. A practice in this case is attributed to 'Umar that at the time of zakāt collection he charged zakāt on the properties of merchants on their assets which were hādīr (in their possession) and ghā'ib (owing to them).<sup>3</sup> 'Alī's view on this issue, however, was rather different. He, on those properties which had already been loaned to others, was inclined to charge zakāt after the recovery of the loan, but according to his view the person have to pay zakāt for all the past years in which his property

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1. This principle was based on a Qur'ānic verse, "They ask what they should spend, say what is surplus from your needs". Q.2:219.

2. Supra, ch.I, p.56.

3. San.,IV, 102; Mus.Sh., IV, 32; Amw., 425 and 430.



had remained as a loan in possession of others.<sup>1</sup> 'Uthmān's practice reflects an intermediate position between the above two instances. He is reported to have declared that if the creditor was able to recover his loan but he ~~did~~ not do so, zakāt, at the time of its collection, would be charged on his entire property including his credits.<sup>2</sup> The same opinion was later on adopted by Ibn 'Abbās<sup>3</sup> (d. 68 A.H.) and 'Abd Allah b. 'Umar<sup>4</sup> (d. 74 A.H.) Probably it was the same practice of 'Uthmān which of later on developed into a form/the theory of dividing the credits into two categories, namely marjū al-adā' (expected to be returned) and ghayr marjū al-adā' (dead debts). The first kind of credits were regarded as subject to zakāt every year at the time of zakāt collection while the others were exempted and were only due after their recovery. This theory appears to be accepted among the jurists of the Successor's time.<sup>5</sup>

Apart from the above problems in the existing zakāt laws relating to loan or debts, another feature of 'Uthman's time was the general complaint about unjust treatment by zakāt collectors. The reports confirm that during this time people of some regions really had some complaints against the assessors or the regional zakāt executives. Abū 'Ubayd related a report that a person once came to Abū Dharr (d. 32 A.H.) in Minā

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1. Ath.Y., 88; Ath.Sh., 95; Maj., 95.

2. Amw., 430.

3. Ibid., 432.

4. Ibid., 431.

5. For the views of the successor jurists in this regard see Ibid., pp.430-6,

complaining against the injustices of zakāt assessors and asked whether at the time of assessment he should keep aside a portion of his belongings rather than allow them to assess his exact property. In response, Abū Dharr strictly forbade him to conceal anything which would result in an evasion of zakāt. However, he advised him that at the time of assessment the assessor should be warned that he should charge him only what is due. Even after this, if the assessor persisted in his attitude, he would surely be recompensed with justice on the day of the Final Judgement.<sup>1</sup> Similarly, another report in this regard is related by Ṣanʿānī that when a group came to ʿAlī complaining against the suʿāt (zakāt collectors) of ʿUthmān, he brought out a document from his possession and handed it to Muḥammad b. al-Ḥanāfiyya (d. 73 A.H.) saying: "Go to ʿUthmān and inform him that the people are complaining against his zakāt collectors while this document testifies the Prophet's instruction in this regard". On hearing this, ʿUthmān replied saying: "We do not stand in need of your document". Muḥammad b. al-Ḥanāfiyya concluded, saying: "If ʿUthmān on this occasion had listened to the advice, the situation would not have deteriorated to that extent".<sup>2</sup> Similarly, Ṣanʿānī mentioned another report about ʿAbd Allāh b. Masʿūd that when ʿUthmān's governor in Kūfa asked him for some amount from the zakāt fund, he explicitly refused, and when he insisted on him producing it, he came to ʿUthmān in Medina and resigned, handing

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1. Amw., 406.

2. San., IV, 6-7; cf. Mus.H., II, 283.

over the keys to him.<sup>1</sup>

The authenticity of these reports seems to be doubtful or at least a possibility of exaggeration in these reports can not be ruled out, for these reports must be seen against the background of the political chaos and the disputes that developed after the assassination of 'Uthmān. However, bearing in mind the situation which had emerged during the last years of 'Uthman's lifetime, it is possible that a kind of distrust had also started to appear between the assessors and assessees.

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In the above, we have tried to determine the legal development which was taking place in the time of the older Companions, pertaining to the zakāt laws. Similarly, we have also tried to examine the ijtihādic and legislative process pertaining to the evolution and development of the above laws. What principles and methods would have been adopted in this process, and in comparison with the Prophet's time, what was the new development that took place in this period? These questions now, in the light of the above study can easily be dealt with.

As far as the sources of ijtihād are concerned, the Qur'ān remained as the first source of ijtihād and legislation as was the case in the Prophet's time as well.

The difference in this regard, however, was that in the

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1. San., IV, 53.

Prophet's time, the Qur'ān was in the stages of its evolution and compilation through piecemeal addresses and verses, which were believed to be intermittently revealed from God according to the time and situation. Following the death of the Prophet, this series of revelations had stopped. The book of God was regarded as being complete and nothing remained to be added to it.

Therefore, the general instructions and the basic constitutional structure for the practical detailed laws, which was provided by the Qur'ān through the stages of gradual evolution had also been regarded as having been completed.<sup>1</sup> It meant that as far as the foundations of the practical laws were concerned they had been fixed and determined for ever and no alteration or addition was to be allowed in this regard. Further development was, however, possible only in the fields of interpretation, application and deduction. New legislation was also permissible if it did not contradict the Qur'ānic texts. These Qur'ānic texts were now final, immovable and unamendable having coercive and binding force. These texts, however, covered only the general and basic instructions or in some cases provided a constitutional structure for the practical laws. Therefore, in the changing circumstances, a wide field for the developing ijtihādīc and legislative advancement was open, even under the limitations imposed by these Qur'ānic texts.

With regard to the zakāt laws, as we have already mentioned in the first chapter, the Qur'ān had merely indicated the basic

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1. These general instructions have already been discussed in details in the first chapter.

concept of zakāt, its obligatory nature, its main aims and objectives, the concept of fear of God as a basic motive for the observance of the law, zakāt as an institution and its heads of expenditure. The vast field for the formulation of the detailed and practical zakāt laws, in this regard, was subject to ijtihād. However, during the period under discussion, the ground was not completely blank but a body of some detailed and practical laws had already been built up through the process of the Prophet's own ijtihād and legislation. The changing conditions of the period of the older Companions demanded the formulation and the systematisation of the implementative details and the solution of new developing problems in the law. These conditions also needed some additions, modifications and some amendments in a few aspects of the implementation of the old Prophetic law. The above study confirms positively that in these fields the process of ijtihād and legislation had been in progress during all the period of the older Companions.

It is also implied from the above that the second important position in the sources of ijtihād and legislation was given to those laws and precedents which had already been evolved in the Prophet's time. Beside the above two sources, the wit and wisdom of the new mujtahidīn of this time must have played an effective role in the process of ijtihād. However, the main reason for any hesitation in this regard was the notion of possible fallibility of human decision and wisdom. Now, due to the withdrawal of divine revelation, there was no political authority or practical leadership in the society which was like the Prophet and could entertain the quality of the divine protection.

The general attitude of the Older Companions seems to have been as follows. First of all they referred to the Prophetic laws as authenticated by the divine revelation or at least divinely approved due to the non-interference of wahy, hence these laws were regarded as infallible and obligatory, therefore, it was felt that they ought to remain unaltered and unamended as far as possible. However this trend did leave a marginal possibility for some change in the law, although always with great hesitation. The situation which emerged on the question of zakāt on commercial horses, in 'Umar's time clearly reflects this trend.<sup>1</sup> It appears, however, that this trend could not prevent the ijtihādīc progress in the direction of new legislation or expansion of the old laws. But, instead, taking the Prophetic laws as a strong base, the process of expansion and ijtihādīc development had continued by means of interpretation application, deduction and legislation.

A second tendency which appears to be prevalent during the time was a progressive inclination among the Companions to mutual consultation in almost all ijtihādīc and legislative matter.<sup>2</sup> The notion of fallibility of an individual's opinion and the absence of the distinctive personality of the Prophet's, compelled the people towards mutual consultation with regard to every important matter. This method of consultation was not only in accordance with Arab traditions but the Prophet himself had practised it in some important affairs.<sup>3</sup> However due to the

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1. Supra, pp. 109-13.

2. Specially during the time of 'Umar. See I. Sa'd, II, 336.

3. Supra, ch. I, p. 81.

Prophet's distinctive status perhaps his view would have been generally accepted by his Companions, and their cautious expressions would have been regarded merely as those proposals for which acceptance of the one or rejection of the whole were entirely left to the Prophet's own independent judgement or decision. However, the situation during the period under discussion seems to be rather different. After the death of the Prophet, the criteria of preference and acceptance of the proposals during the mutual consultation, in spite of the procedure of seeking an independent judgement or a final decision by a central figure, appears to be moving towards argumentation, and rationalisation. Therefore the caliph himself had to defend his argument for his views<sup>1</sup>. This specific trend regarding mutual consultation can be considered only as a new development of this period. However, it appears that the above councils were generally confined to the senior and experienced Companions, who had already gained distinction due to their deep insight and close association with the Prophet. But there are examples that occur in the case of a few junior Companions, who not only participated in the counselling but were also encouraged due to their personal intelligence and judgement. Among them, 'Abd Allāh b. 'Abbās and Zayd b. Thābit can be included.<sup>2</sup>

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1. Supra, p.111

Cf. 'Umar's consultation with Companions on the problem of Fa'y at Khi.Y., 26-8.

2. Ibn 'Abbās himself had testified that 'Umar b. al-Khaṭṭāb used to invite him into consultation with the Older Companions. See Ibn al-Qayyim, I'lām al-Muwaqqi'īn ed. 'Abd al-Rahmān al-Wakīl (Riyād, 1969), vol.I, p.19.



Apart from the growing trend of mutual consultation in this period, the selective adaptation or Islamisation may be assumed as one of the sources for the ijtihādic and legislative activities pertaining to the different laws in general. Due to the expansion of the boundaries and the emergence of new cities of Kūfa, Baṣra and Fustāṭ, the jurisdiction for the enforcement of the law had been considerably widened. Therefore, in the process of its expansion and legislation for new problems, the law might have been influenced by some neighbouring cultures and certain elements might have been adopted or Islamicised. In the realm of zakāt law, the appointment of ʿāshirīn (collectors) on main trading routes, which took place in ʿUmar's time, can safely be assumed as an example of external influence or Islamicisation. However, as far as the zakāt laws in general are concerned the examples of external influence or any Islamicisation in this regard are few and far between.<sup>1</sup> Thus it can be concluded that this was used for ijtihād yet it did not greatly influence the zakāt laws.

Now in the light of the above discussions the following order of precedence in the sources of ijtihād during the time of the Older Companions can be deduced.

1. The Qur'ān
2. The Laws of the Prophet's time, practices and precedents.

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1. As far as our primary sources are concerned we could not find any substantive evidence of external influence except in the case of appointment of ʿāshirīn on the important trading routes.

3. Mutual consultation (shūrā)
4. Individual reasoning and judgement (ra'y)
5. External influence or islamicisation.

From the above five sources, the first two were the only totally independent sources of ijtihād carrying with them coercive and binding force over the others. This meant that through the process of benefiting from the other three sources, it was only possible to make deductions which might not be considered as violating the demands and the restrictions laid down by the first two sources. However, in the process of inference from the first two sources a delicate distinction between the two seems to be observed during this time. This distinction emerged from the fact that the first source, the Qur'ānic texts, had been preserved in a written form, being regarded as the final authoritative words from God, while the second source, the laws and precedents of the Prophet's time, though enforced in the society, had not yet been completely and systematically collected. Therefore, in spite of the Qur'ān, in the process of ijtihādīc inference from the second source, a strong inclination to pay a greater emphasis on the aims and objectives rather than the literal words of the Prophet (either directly heard or reported) <sup>have been</sup> appears to be prevalent during this time. However, from the very beginning there seems to have existed a cautious and hesitant attitude towards a reinterpretation of the Prophet's ijtihādīc decisions.

Of the three remaining sources, the third and fourth, "the mutual consultation (shūrā)" and "the individual reasoning and judgement (ray')" seem to be actually the main sources for the

developing ijtihādīc activities of this time pertaining to zakāt laws, while the last mentioned source "adoption or Islamicisation" seems to be a source of less importance.

As far as the methodology of inference from the above mentioned sources is concerned, the above study leads us to conclude that the same five methods, namely interpretation, application and formulation of implementative details, deduction, new legislation and selective adaptation, which had already been introduced during the Prophet's time were generally adopted during this period as well. However, an extensive development in the use of the above methods during this time can also be concluded from the above study.

Particularly in the process of interpretation and deduction, beside the Qur'ānic texts, the laws of the Prophet's, his practices and precedents and his relevant legal utterances were now brought into real focus. The principle that a full year of ownership should pass for the new possession for the purpose of assessment of zakāt, which was adapted in Abū Bakr's time, as we have already mentioned, shows the extensive process of interpretative deduction from the old prophetic law and practices.<sup>1</sup> Similarly, during the time of 'Uthman the decision to assess properties after excluding the payable debt reflects the same process.<sup>2</sup> It is, however, of supreme importance to note that, during this time, the examples of controversies and disputes within the limits of interpretation and deduction are seldom found. Probably the political integrity and the growing trend of this time towards mutual consultation in

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1. Supra, p. 108.

2. Supra, p. 126.

every matter of importance did not allow those dissensions to flourish which appear to have sprang up just after the end of this period.

Apart from the method of interpretation and deduction the process of application and formulation of implementative details appears to have continued during this time. The above quoted instructions of 'Umar, which reportedly were sent to the zakāt collectors of different regions at different times can be considered as examples in this regard.

In the realm of deduction, a significant development of this time was the use of qiyās. As we have already mentioned, during the time of 'Umar the enforcement of two different rates for honey acquired from mountains and that acquired from plains clearly indicates the adoption of the method of qiyās.<sup>1</sup> However, the qiyās of this time should not be considered as a parallel to that qiyās which towards the end of the second century A.H., passing through the stages of its development, had taken a form of an organised way of deduction with a confirmed definition and disciplined principles. This method had been eventually accepted as a popular mode of inference and reasoning among the later jurists and ultimately created an immense literature which is to be found spread over the many volumed books of the different schools of Muslim Jurisprudence. However, it can safely be asserted that the seeds of qiyās had been sown during the time of the older Companions.

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1. Supra, pp. 116-7.

There are several examples of such new legislation during this period but it appears that the legislation of this time was perhaps considered from its inception as more liable to later emendation than the laws of Prophet's time. This assertion is supported by the above referred suggestion of 'Alī which was given to 'Umar in the case of zakāt on horses. During 'Umar's period on being asked, at the time of consultation on the problem of zakāt on horses, 'Alī then said "If people are willing to pay, you can introduce a rate for horses but it may not be taken as a permanent tax which will be levied compulsorily after you".<sup>1</sup> The last part of the above quoted sentence of 'Alī may reflect the attitude of the Companions towards the current legislation of their time.

After establishing the sources and methods we will now try to determine those principles which can be inferred from the above study as having been considered during the time of the older Companions, as the guiding principles for the ijtihādic activities pertaining to zakāt laws. From the above study it is apparent that the principles which were deduced by us as the principles of the Prophet's ijtihād in the first chapter,<sup>2</sup> were also being generally observed during this time as well. However, some special aspects of these principles which presumably evolved during this time are summarised in the following.

(i) Beside the superiority of the Qur'ān, the laws,

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1. San., IV, 35; Mus.H. I, 189.

2. Supra, pp. 84-90.

practices, and precedents of the Prophet's time and sometimes the relevant utterances of the Prophet were also considered during this time as superior in the ijtihādīc activities pertaining to zakāt laws. However, as we have explained, during the time under discussion the main emphasis was being given to the aims and objects which might have been working behind the unwritten laws of the Prophet's time rather than the literally following of the words of the Prophet.

(ii) In the realm of the application and the formulation of implementative details, the notion of maslaha (public benefit) and the principle of raf' al-haraj (avoidance of hardship) appears to have become more prominent during this time. This is evident from the various steps which were taken by 'Umar regarding the application of the law.<sup>1</sup>

(iii) Although the concept of fear of God and the moral aspect of the law still existed as a motive behind the observance of the law in the society, yet the power of an organised government through its introduction of punitive methods was playing a more effective role in the enforcement of the law in general. This new development can easily be traced in the waging of war against those who had refused to hand over their zakāt

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1. Supra, pp. 120-22.

fund to the centre, or at least were not ready to accept the authority of Medinan government with regards to its spending.<sup>1</sup> Moreover, the enactment of a legal penalty for the evader of zakāt which was carried out during the time of 'Umar also reflects the above fact.<sup>2</sup>

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1. Supra, pp. 102-6.

2. Supra, pp. 117-9.



### CHAPTER III

#### THE PERIOD OF THE YOUNGER COMPANIONS

(35 A.H./656 A.D. - 73 A.H./692 A.D.)

The period which is under discussion in this third chapter begins in 35 A.H. with the assassination of 'Uthmān and covers almost the following 38 years up to the time of the execution of 'Abd Allah b. Zubayr in 73 A.H. We have named this intricate and critical phase of Islamic history "the period of the younger Companions", because as far as the older Companions are concerned, most of them had already died and the practical leadership of the society had now been transferred to the generation who were either born or were quite young during the Prophet's time. Although the people of this generation, having lived in the Prophet's time, are also called in traditional Muslim terminology Companions of the Prophet, they can not generally be assumed to be his close intimates. This younger generation of the Prophet's time was now holding power and control over almost every branch of practical life in the society.

Specifically in the field of religious law, most of the significant personalities belonged to the same generation. Of the older Companions there were 'Alī (d. 40 A.H.), Ṭalḥa (d. 36 A.H.), Zubayr (d. 36 A.H.), 'Amr b. al-<sup>(d. 43 A.H.)</sup>Āṣ, Abū Mūsā al-Ash'arī (d. 44 A.H.) and 'Ammār b. Yāsir (d. 36 A.H.). These persons, however, lived only in the early phase of this period. Other eminent figures of the field were Zayd b. Thābit (d. 45 A.H.), 'Abd Allah b. 'Abbās (d. 67 A.H.), 'Ā'isha (d. 58 A.H.), 'Abd

Allāh b. 'Umar (d. 73 A.H.), Abū Hurayra (d. 67 A.H.), Abū Sa'īd al-Khudrī (d. 78 A.H.), Anas b. Mālīk (d. 94 A.H.), Sa'd b. Abī Waqqas (d. 55 A.H.), 'Abd Allāh b. 'Amr b. al-'Āṣ (d. 63 A.H.) and Jābir b. 'Abd Allāh (d. 73 A.H.). All of them were among the younger Companions of the Prophet. However a small number of the jurist-consults had already emerged from the group of tābi'īn (successors of the Prophet's Companions) during the middle of the above mentioned period. These tābi'īn in fact <sup>were</sup> brought up in the time of the older Companions, and had contacts with them. Such men include 'Alqama (d. 69 A.H.)<sup>1</sup>, Masrūq (d. 63 A.H.)<sup>2</sup> and Sa'īd b. al-Musayyib (d. 94 A.H.).<sup>3</sup>

Another characteristic of the situation as a whole during this time was the political disunity and widespread chaos which began as the result of the assassination of the third caliph 'Uthman and eventually resulted in a state of civil war. In general, the period from 35 A.H. to 73 A.H., as a whole, presents a picture of internal conflicts and civil discord. This statement is especially true about the state of affairs during 'Alī's caliphate (from 35 A.H. to 40 A.H.), when he had to face two civil wars of Jamāl and Ṣiffīn (in 36-37 A.H.) and then as the result of the so called arbitration he had to fight Khārījites in Nahrawān.<sup>4</sup> The above statement is also applicable to the state of affairs during the time of Yazīd (from 60 A.H. to 63 A.H.), when

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1. I. Sa'd., IV, 86.

2. Ibid., 76.

3. Ibid., II, 379.

4. For Jamāl and Ṣiffīn, see Tab., IV, 506-8 and 569-82. For the affairs of Kharijites, see Tab., V, 75-77.

unity further disintegrated as a result of the bloodshed at Karbalā' near Kūfa and at Ḥarra in Medina.<sup>1</sup> This statement about internal conflicts can also be applied to the reign of Marwān and his son 'Abd al-Malik until 73 A.H., when 'Abd Allāh b. Zubayr had gained power over regions of Iraq and Ḥijāz and the rulers of Damascus had to send military expeditions against him, which eventually resulted in his execution in 73 A.H. at Mecca.<sup>2</sup> The twenty years of Mu'āwiya (from 40 A.H. to 60 A.H.), however, appear to be an intermediary phase showing apparent peace and quietness, but even in this time the local revolts of Kharijites occurred at frequent intervals. Furthermore it is a fact that the government of Mu'āwiya was not willingly accepted by the people of Iraq and Ḥijāz. Particularly after 50 A.H. when he disclosed his intention of nominating his son as the successor to his caliphate, many of the influential personalities of Iraq and Ḥijāz openly expressed their dissatisfaction with the government.<sup>3</sup> Political instability usually affects the enforcement of law and its further development in society. Therefore this particular aspect of the situation must be kept in mind during the study of any legal development in the period proposed for this third chapter.

Apart from political instability and its possible negative effects on the law, there are some other factors as well which might have affected the developing law during the proposed period.

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1. Ibid., pp.486-7.

2. Ibid., VI, 187.

3. Al-Suyūṭī, Tarīkh al-Khulāfā', (Delhi, 1345 A.H.) p.137.

The first important thing in this regard was the lack of centrality and the renunciation of mutual consultation. In the time before 35 A.H. the process of mutual consultation seems to have played a major role in the developing ijtihādic/legislative activities<sup>1</sup> but now, presumably due to the involvement of force and compulsion in the settlement of political affairs, the process had lost its central value and had been reduced to a lower degree of importance. Specifically in the field of law and ijtihād the process of mutual consultation could not be retained at all. It was due not only to the new political structure but also to the spreading of the jurist-consult Companions into the different cities of the empire. This situation was entirely different to that which had existed during the time of the older Companions, when all such personalities were residing at Medina and could easily be consulted by the government whenever they were needed. 'Umar was especially conscious of it and he intentionally did not allow any such person to settle in the cities distant from Medina except in cases where he himself deputed any such person for some official purposes.<sup>2</sup> But in the later time of 'Uthmān this situation had begun to change. As he did not compel the people to stay in Medina they started to move away to distant cities.<sup>3</sup> Hence, during the time of the younger Companions many such personalities

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1. Supra, ch. II, pp. 134-5.

2. Tab., IV, 396-7; Cf. Tāhā Ḥusayn al-Fitna al-Kubrā, (Cairo 1959), p.17 and p.46.

3. Ibid.

had already settled in different areas including Kūfa,<sup>1</sup> Baṣra, Yemen, Mecca, Damascus and Fuṣṭaṭ (now Cairo). Thus it was rather difficult to assemble all the jurist-consult personalities from the different cities in the capital Damascus. Possibly in the situation which emerged at that time, such an assembly might not have been considered in the interests of the rulers of Damascus. At any rate, while the reasons may be many and varied, it seems probable that it was the lack of centralisation and the renunciation of mutual consultation during this time which eventually turned the direction of the ijtihādīc/legislative activities to the individual ijtihād and private fatāwā (legal decisions instead of the joint ijtihād and official or agreed statements.

Likewise, another important characteristic of this time was the establishment of teaching circles around the distinguished personalities in different regions. Although some gatherings of learning and teaching can also be traced in the time of the older Companions, it appears that during the time of the younger Companions these circles had become very common. Some teaching circles had already been established in almost every city around distinguished Companions or some local personalities of the region.<sup>2</sup> In this way, the particular images of some religious

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1. Dulābī (d. 310 A.H.) mentions a report from Qatāda (d. 118 A.H.) that a considerable number of Companions migrated to Kūfa, and fourteen of them were persons who had participated in the battle of Badr. See his Kitāb al-Kinā wa al-Asmā' (Hyderabad, India, n.d.), vol.I, p.174.

authorities were evolving. This is the reason that in the later time these circles claiming authority from some renowned personalities had become so famous that they attracted a considerable number of students from different regions to come and study there. In these circles the major subject of the discussion was definitely the teachings of the Prophet. However, the teachers must also have been exercising their ijtihād on the new developing legal issues. Thus, these circles, on the one hand, were proving themselves as an important means of propagating the Prophetic teaching to far and distant regions of the Muslim state and subsequently to the forthcoming generations as well. On the other hand these circles were also serving as a source of popularising the views and ijtihādāt of the respective teachers and consequently they had become a means of publicising and furthering ijtiḥādīc disputes and legal conflicts. This is the reason that during the period under discussion, a considerable number of ijtiḥādīc disputes and controversies can easily be traced in almost every branch of the developing law.

Another characteristic of this period which should also be kept in mind during our study is the emergence of sects like Khawārij and Shī'a. By the end of the above period these groups had already developed some distinctive doctrines.

It is obvious that the process of division among Muslims would create an atmosphere of mutual distrust and animosity in society. Therefore during the said period, law and ijtihād

could not escape the effects of the situation.

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As far as the study of law and ijtihād are concerned, we, at the very beginning of the period, face the renowned juristic personality of 'Alī. This comparatively young Companion, who was one of the closest comrades of the Prophet and who was his son-in-law, had already acquired an eminent position in the field of ijtihād and legislation during the time of Abū Bakr and 'Umar. His name is frequently mentioned in the sources in connection with ijtiḥādīc/legislative advice during 'Umar's time. However, it can be assumed that after becoming a caliph he probably could not find enough time to make much advancement in the domain of law and ijtihād. This was perhaps due to the continuous state of emergency and civil war which he had to face during all his five years of rule. In the realm of zakāt law, however, some of his ijtiḥādīc efforts can be pointed out on the basis of our primary sources.

In this regard the total exemption of al-hawāmīl wa-al-ʿawāmīl (beasts of burden or animals employed in some work) for zakātable animal property can be regarded as an example of the ijtiḥādīc legislation of 'Alī. Its attribution to 'Alī has, however, been confused because of a few reports which are mentioned in the later compilations of the prophetic traditions. These reports take back the decree of the above exemption to the Prophet himself. However, a critical analysis of the reports can show its attribution to 'Alī as more probable than its attribution to the Prophet himself.



Abū Ḥanīfa (d. 150 A.H.) in his K. al-Athār reported a statement of 'Alī that he said "laisa fī al-ibil al-hawāmil wa al-'awāmil sadaqa" (no zakāt is obligatory on the camels which are kept as beasts of burden or as the animals employed in some work).<sup>1</sup> Ṣan'ānī also mentioned a report of Ma'mar (d. 153 A.H.) and Thawrī (d. 160 A.H.), the two contemporaries of Abū Ḥanīfa, that they through the chain " — Abū Ishāq — 'Āṣim b. Damra — " reported about 'Alī that he once said "laisa 'alā awāmil al-baqar shay'" (Nothing is obligatory on the cattle (cow) employed in the work).<sup>2</sup> The reports in al-Majmū' not only confirm the above statement of 'Alī in the case of both ibil and baqar but also contain an additional phrase attributed to 'Alī (Zakāt can be levied only on those animals which are pastured).<sup>3</sup> Thus as far as the sources of the second century A.H. are concerned no report can be traced which takes this exemption from zakāt back to the Prophet himself. Ṣan'ānī, however, mentioned a report which attributes a similar exemption to Mu'ādh b. Jabal (d. 18 A.H.) in the case of 'awāmil al-baqar only.<sup>4</sup> If this report is correct, it would seem that he, in his time at Yemen, had also exercised his ijtihād on the problem, and had also reached the same conclusion. As far as its attribution to the Prophet himself is concerned, no positive evidence in this regard can be traced at least in the available sources of the second century A.H. However, the sources which were

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1. Ath.Y., 87.

2. San., IV, 19.

3. Maj., 91.

4. San., IV, 20.

compiled at the beginning or middle of the third century A.H., contain some reports about the above exemption of 'awāmil and hawāmil as the decision of the Prophet himself. Abū 'Ubayd (d. 224 A.H.) mentioned a report which though narrated through a chain of four transmitters, the last of whom is 'Amr b. Dīnār (d. 126 A.H.) stating that he had heard a report that the Prophet had exempted al-thawr al-Muthīra (the bull employed in plough) from zakāt.<sup>1</sup> Similarly, Abū Dā'ūd while mentioning a report through a chain of "—Nufayli (d. 234 A.H.) — Zuhayr — Abū Ishāq — 'Āṣim b. Ḍamra and al-Hārith " relating a statement of 'Alī "laisa fī al-awāmil shay'" (Nothing is obligatory on the working animals),<sup>2</sup> also reported a remark of Zuhayr (the second name in the above chain of the transmitters) that in his view 'Alī might have narrated the report from the Prophet.<sup>3</sup> However, Abū Dā'ūd, himself, made it clear that the above report of Nufaylī, though also reported by Shu'ba (d. 160 A.H.) and Sufyān (d. 161 A.H.) through the same chain from Zuhayr to 'Alī but ~~both of them~~ reported it as a statement of 'Alī without taking it back to the Prophet.<sup>4</sup>

The unsoundness of the attribution of the above two reports

1. Amw., 380.

2. A. Dā'ūd, II, 100.

3. Ibid. His exact words are أحسبه عن النبي صلى الله عليه وسلم

4. Ibid., 101. Besides Shu'ba and Sufyān this statement of 'Alī is also reported by Na'īm b. Ḥammād of al-Khuzā'ī (d. 228 A.H.) and Dar Qutnī (d. 385 A.H.) through the different chains of transmitters. Both of them did not take it back to the Prophet. See Ibn al-Qayyim, I'lām al-Muwaqqi'īn (Riyād, 1968 A.D.), vol.II, p.67.

to the Prophet is evident from their contents. The first mentioned report of Abū 'Ubayd can only be regarded as one of balāghāt<sup>1</sup> of 'Amr b. Dīnār (d. 126 A.H.). A report which includes such information introduced by the word balaghana without any direct isnād back to the Prophet cannot be taken as providing real evidence. Similarly, the second report of Abū Dā'ūd shows only an assumption of Zuhayr, a person of a much later time.<sup>2</sup> Specifically the attribution of the above mentioned assumption to Zuhayr itself is doubtful in the light of the reports of Shu'ba and Thawrī.<sup>3</sup>

After having gone through the detailed analysis of the relevant reports to the problems it seems to be more probable to conclude that the above exemption of al-hawāmīl and al-'awāmīl was not a decision which was made by the Prophet but instead was a result of a later ijtihād which was practically enforced by 'Alī in his time.

The question, however, remains as to what was the basic ground on which the above ijtihādīc decision was made. There are many reasons which presumably would have directed 'Alī to the above ijtihādīc conclusion. The first possibility in this regard is the interpretation and application of the Qur'ānic principle of al-'afw<sup>4</sup> to the new situation. This principle requires that

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1. The reports of later transmitters which contain ~~the~~ <sup>further</sup> statements of the Prophet but without any chain of transmitter.
  2. If this person is Abū Khaythama Zuhayr b. Ḥarb, then he died in 234 A.H.
  3. A. Dā'ūd, II, 101.
  4. Q. 2:219.

zakāt should be levied only on the surplus wealth after essential personal needs.<sup>1</sup> As we have already seen this principle was strictly observed by the Prophet while fixing the different zakāt rates on different items. Therefore, it is quite possible that in interpreting and applying the same principle 'Alī, in his time, exempted al-hawāmīl and al-'awāmīl from zakāt considering them as essential for the peasants.

Another thing which should be considered here is the total exemption of horses from zakāt in the Prophet's time. This could have led 'Alī to exempt some other animals as well on the same basis. As we have explained in the second chapter, in the Prophet's time horses were not generally reared on a large scale for the purpose of breeding and trade but instead they were only kept for the individual's private needs such as fast travelling and particularly for purposes of warfare. Hence they were exempted from zakāt.<sup>2</sup> On the same basis 'Alī might have considered that al-hawāmīl and al-'awāmīl can be excluded for the private needs of the farmer. Moreover these animals were different to the general flocks and herds in the sense that they were not pastured animals and were fed on forage. Therefore 'Alī might have considered this difference as a ground for their exclusion from the general zakātable livestock.

The third possibility is the consideration of the zakāt rates for agricultural produce. The Prophet had already fixed a 10% and 5% zakāt rate on the total produce at the time of harvest. As al-hawāmīl and al-'awāmīl were only a part of the process of agricultural production at that time, the zakāt rate on the harvest would have been considered enough and an additional zakāt

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1. Supra, ch.II, p.128.

2. Supra, pp.109-10.

rate on the above animals, perhaps was considered to be unjustified by the zakāt payers. This argument, according to our sources was presented by al-Zuhrī (d. 124 A.H.) and in later time by al-Tanūkhī (d. 168 A.H.)<sup>1</sup>. It is possible that 'Alī himself might have based his own judgement on the same basis.

Anyway, leaving the question of the exact basis on which the above ijtihādīc decision was made, it appears that this ijtihādīc decision of 'Alī was widely accepted by the jurists of the period under discussion and by the jurists in the later time. Jābir b. 'Abd Allah (d. 73 A.H.),<sup>2</sup> Sa'īd b. Jubayr (d. 94 A.H.)<sup>3</sup>, Ibrāhīm Nakha'i (d. 95 A.H.)<sup>4</sup>, Mujāhid (d. 103 A.H.)<sup>5</sup>, and al-Zuhrī (d. 124 A.H.)<sup>6</sup> have reportedly given their verdicts in favour of exemption of al-hawāmil and al-'awāmil from zakāt.

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Another ijtihādīc decision of 'Alī, in the period under discussion, was the exemption of horses once again from zakāt. Horses, though, were totally exempted from zakāt in the Prophet's time, but during 'Umar's time as we have mentioned in the second chapter,<sup>7</sup> a specific zakāt rate was levied on horses as well,

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1. Amw., 381.

2. San., IV, 19; Amw., 380.

3. Ibid.

4. Ath.Sh., 97; San., IV, 20; Amw., 380.

5. San., IV, 20; Amw., 380.

6. Amw., 381.

7. Supra, ch.II, p. 112.

because of the new development in the case of horses in the changed conditions of Syria and Yemen. This practice was also continued in the time of 'Uthmān, but it appears that 'Alī, perhaps, in his time had abandoned the above practice and he, once again exempted horses from zakāt. This can be discerned from the statement of 'Alī which is reported by Ṣan'ānī: "I have exempted horses from zakāt".<sup>1</sup> It is quite possible that during 'Alī's time a similar situation to that which existed during the Prophet's time may have recurred. It should be seen particularly in the light of the fact that even in the time of 'Umar a zakāt levy on horses was introduced only because of the regions of Syria and Yemen, where horses were being reared on a large scale for business purposes. Thus, it had become a major source of income and it could not be left totally exempted from zakāt, consequently a rate of one dinar per horse was determined. But now, during the time of 'Alī when the situation had again altered, the territory of Syria could not be retained under the control of 'Alī and as far as the regions of Iraq and Ḥijāz are concerned, horses were not reared there on a large scale for the purpose of business. Therefore, it is understandable that the change of situation might have directed 'Alī to exempt horses once again from zakāt.

Nevertheless, as a result of this possible exemption by 'Alī the issue had become a rather disputed one among the jurist Companions of the time. This can be inferred from the reports which mention that when Marwān once consulted with the Companions

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1. San., IV, 6 and 34. The reported statement of 'Alī is

"قد عفوْتُ صدقة الخيل"

on this issue, Abū Hurayra (d. 57 A.H.) then narrated the Prophet's statement saying: "No zakāt is obligatory on a Muslim for his horses and slaves". Marwān, then turning to Zaid b. Thābit (d. 45 A.H.) asked: "Abu Sa'īd! What is your opinion regarding the case?" It made Abū Hurayra angry and he said: "I am surprised with Marwān when I have narrated the Prophetic words before him and he says: Abū Sa'īd! What is your opinion in this case." According to the report, Zaid b. Thābit then explained that as far as the statement of the Prophet~~was~~ concerned it~~was~~ quite true but by this he meant the horses of soldiers.<sup>1</sup> The same view regarding the above quoted words of the Prophet is also related from Ibn 'Abbās (d. 68 A.H.)<sup>2</sup>, another eminent jurist of that time. However, it seems that probably Abū Hurayra, himself, was not in favour of zakāt, even if the horses were reared for commercial purposes, considering it a violation of the Prophet's instruction. The same stand was later adopted by 'Umar b. 'Abd al-Azīz in his time.<sup>3</sup> However some other jurists of the Successor's time such as Ibrāhīm Nakha'ī and Ḥammād (d. 120 A.H.) were still in favour of zakāt on those horses which were reared as a major source of income for commercial purposes.<sup>4</sup>

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Another minor ijtihādic amendment of 'Alī can also be pointed

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1. Al-Zayl'ī, Naṣb al-Rā'ya (Beirut, 1393 A.H.) vol.II, p.357.

2. Amw., 464.

3. Infra, ch.IV, p.214.

4. Ath.Y., 87; Ath.Sh., 96; San., IV, 34.



out in the prescribed zakāt law of camels. This minor amendment was actually relevant to the clause of compensation, where, in the case of non-possession of the animal of particular age, fixed by the law, it was allowed to take a younger or older animal in zakāt, provided that the party affected by it was compensated at the rate of two sheep or twenty dirham against the difference of one year in age.<sup>1</sup> This clause of compensation continued to be practised in the time of 'Alī as well but probably the rate of compensation had been amended by him as two sheep or 10 dirham instead of 20 dirham, as was prescribed before, against the difference of one year in age of the animal to be taken as zakāt. This inference is based on the reports in which the detailed zakāt law of camels is related by 'Alī.<sup>2</sup> It could be perhaps that in the time of 'Alī the price of sheep had fallen, hence taking sheep instead of dirāhim as the criterion 'Alī amended the law accordingly.

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After 'Alī, an ijtihādīc innovation by Mu'āwīya can also be traced in connection with the rate of sadaqat al-fitr. The rate for this sadaqa which was already fixed in the Prophet's time was in terms of dates and barley.<sup>3</sup> Some reports also suggest one sā' of raisins (zabīb) per person as the rate of sadaqat al-fitr fixed by the Prophet.<sup>4</sup> However, nothing from the Prophet can be

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1. Supra, ch.I, p.59
2. Maj., 91; San., IV, 39.
3. Muw.I., 210.
4. Ibid.

demonstrated in terms of wheat. This was probably due to the fact that wheat was not generally grown in the Hījāz in the Prophet's time. Probably dates and barley were the only common produce among the people of the Hījāz at that time. But in later times the Syrian wheat would have been easily available for the people. Therefore, they might, then, have needed to be told the rate of sadaqat al-fitr in terms of wheat as well as in terms of the other produce. It is reported that Mu'awiya, in his time, had declared that if sadaqat al-fitr was to be paid in the form of wheat, then the rate was only half sā' in the place of one sā' of dates or barley which was fixed by the Prophet.<sup>1</sup> In this connection, Ṣan'ānī related several reports which are attributed to 'Abd Allah b. 'Umar (d. 74 A.H.) and Abū Sa'īd al-Khudrī (d. 74 A.H.). According to the reports, the former had mentioned on several occasions that the rate of sadaqat al-fitr, that was originally fixed by the Prophet, was only one sā' of dates or barley but in later time half a sā' of wheat was also regarded by people as equal to one sā' of dates and barley.<sup>2</sup> The reports of Abū Sa'īd al-Khudrī not only confirm that the above mentioned half a sā' of wheat was a later development but also give the information that it was Mu'awiya who made the above ijtihādic judgement.<sup>3</sup> He, reportedly, once came to Mecca for the purpose of the hajj or 'umra. There, he consulted the people and declared publicly the rate of sadaqat al-fitr in terms of wheat as half a sā'.<sup>4</sup> Besides Mu'awiya among

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1. San., III, 316.

2. Ibid., 312.

3. Ibid., 316.

4. Ibid.

the other Companions of that time, Abū Hurayra and Jābir b. 'Abd Allāh held the same view.<sup>1</sup> However, it appears from the reports that Abū Sa'īd al-Khudrī (d. 74 A.H.) was against the above ijtihādīc judgement of Mu'awiya.<sup>2</sup> Abd Allāh b. 'Umar also reportedly preferred to pay sadaqat al-fitr in the form of dates and barley rather than wheat.<sup>3</sup>

After Mu'awiya, as far as the other rulers of the period, Yazīd, Marwān and his son 'Abd al-Malik are concerned, nothing which can be attributed to them can be traced from our sources in the realm of zakāt law. Their names are not generally quoted in other spheres of the religion and law as well. It was due to the fact that they, although being the rulers, were only regarded as the political leaders and controllers of the society but not their religious leaders by the general population.

After having examined the ijtihādīc contribution of the rulers to the development of zakāt law, during the period under discussion, we now turn to that ijtihādīc process which was being used by the jurists of different regions in a purely individual and private sphere without any involvement in the government. As we have mentioned at the beginning of the chapter, the institution of mutual consultation, which was maintained by the first three caliphs for the furtherance of the ijtihādīc process in the field of religious-juristic matters, could not be retained now. Therefore, the major domain where ijtihādīc opinions could be formed and expressed

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1. Ibid., 311; 315.

2. Ibid., 316.

3. Ibid., 317.

were the private gatherings of the jurists or the local teaching circles in different regions and law (fiqh). New questions, which were being raised by the people, and some old issues which might need re-interpreting in the changing conditions, compelled the jurists to exercise and give their personal judgements.

As there was no formal link or any central organisation among the jurists of different regions, varied and sometimes contradictory judgements (fatawā) on the same issues were being evolved and subsequently expressed by them to their students. These different or contradictory personal judgements (fatawā) must have been circulated and publicised among the general people. This major change in the pattern of the ijtihādīc process is very significant from the viewpoint of our study, because it eventually diverted the trend of the developing religious law to diversity in law and internal conflicts. This perhaps paved the way in later times for the emergence of regional schools in Iraq and Hijāz, which seems to have become distinctive around the end of the first century or at least at the beginning of 2nd century A.H. But, here, we should confine the discussion to the period proposed for this chapter, what the main issues were in the realm of zakāt laws, which were being questioned and discussed among the jurists of different regions and what were their individual judgements

(fatawā) on these issues.

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In this regard the first important discussion relating to zakāt was the question of whether or not it was a religious obligation for a Muslim to hand over his zakāt in all circumstances to the rulers only and not directly to the beneficiaries of zakāt fund. Another question was whether a person who has handed over his obligatory zakāt directly to the beneficiaries had fulfilled his religious obligation.

A similar problem had been faced by Abū Bakr, the first caliph,<sup>1</sup> but the nature of the case and the situation had become different. The real cause of the problem at the time was the general lack of confidence in the government. People had doubts about the spending of zakāt income by the government on its specific heads which were determined by the Qur'ān. Several reports confirm that people during this time were coming to the jurists and were repeatedly asking that as their rulers did not spend zakāt income on its specific heads, why they should not pay their zakāt directly to the beneficiaries.<sup>2</sup> Differing answers were being presented by the jurists to these questions. A considerable number of the jurists seemed to hold the view that collection of zakāt was religiously a responsibility of government. Therefore, in every situation it must be handed over to the state. Sa'd b. Abī Waqqās (d. 55 A.H.), Abū Hurayra (d. 57 A.H.), Abū Sa'īd al-Khudrī (d. 74 A.H.) and 'Abd Allāh b. 'Umar (d. 73 A.H.) reportedly had

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1. Supra, ch.II, pp.101-6.

2. San., IV, 46; Amw., 568-72.

held the above view.<sup>1</sup> The last mentioned jurist, 'Abd Allāh b. 'Umar, seems to be very staunch in the above stand. According to a report, his stand was so extreme that he had once said that if a person had handed over his zakāt directly to the beneficiaries, he had not, in fact, fulfilled his religious obligation and he would have to repay his zakāt.<sup>2</sup> According to another report he went so far as to say that even if the rulers purchased lynx and falcons from the income of zakāt, it would be incumbent on the Muslims to hand over their obligatory zakāt to their rulers.<sup>3</sup> Likewise in another report, a statement is attributed to him: "Even if you find your rulers eating dog's flesh, you have to pay your zakāt to them".<sup>4</sup> The attribution of this statement to him, though, was doubted by the people even in the time of the successor jurists.<sup>5</sup> However, it can be inferred from the above quoted reports as a whole that 'Abd Allāh b. 'Umar was probably more strict in his view of the problem.

On the other hand, there were some other jurists who, in contradiction to those views, inclined to the stand that in a situation when the rulers do not spend the income of zakāt on its specific heads then it is preferable to hand over the zakāt to its beneficiaries directly. Ibn 'Abbās and his student Tā'ūs

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1. San., IV, 46; Amw., 568-72.

2. Mus.Sh., 29; San., IV, 45.

3. San., IV, 47.

4. Ibid., 46; Mus.Sh., IV, 28.

5. It is reported that when Ḥammād (d. 120 A.H.) heard the above statement, he expressed his scepticism about its attribution to Ibn 'Umar; see San., IV, 46.

held the same view.<sup>1</sup> In Medina, Sa'īd b. al-Musayyib also reportedly was inclined to the same view.<sup>2</sup> Probably during the period under discussion, some other jurists would also have held the same view, but here it should be kept in mind that it was not so easy for those jurists who held the above view to express it publicly. This assertion is supported by a report of San'ānī that once Abbān b. 'Uthmān (d. 105 A.H.) met secretly with Ḥasan al-Baṣrī when he was in hiding in the house of Abū Khalīfa out of fear of arrest at the time of al-Ḥajjāj b. Yūsuf. According to Abbān, a man came and said to Ḥasan that he had once asked 'Abd Allāh b. 'Umar about his view of handing over zakāt to the government in every situation. He answered that you can pay your zakāt directly to the beneficiaries. Ḥasan, then addressing Abbān, reminded him saying: "Look! I have not said that if 'Abd Allāh b. 'Umar felt himself safe (to speak openly) he usually suggested that the questioner pay zakāt to the beneficiaries directly rather than to the government".<sup>3</sup>

However, it can be discerned that the general stand of those

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1. San., IV, 44, 46, 48.
  2. Ibid., 47.
  3. Ibid., 47-8. A similar thing is reported by Sa'īd b. Jubayr (d. 94 A.H.) as well. On being asked about zakāt by Ḥassan b. Yahyā al-Kindī, he replied: "Pay it to the rulers". However, when Sa'īd left the place, Yahyā followed him and repeated the question, mentioning that the rulers were doing such and such with the zakāt collection. Sa'īd, then, said: "You can spend the zakāt directly on the beneficiaries. However, how could I say it when you asked me this question in public?" Amw., 572.



who held the above view would have been that the portion of wealth which had been taken by the government as zakāt would be considered as paid zakāt. Therefore, after taking it into account, the person should assess outstanding zakāt on that property which remained unassessed by the government which he should pay directly to the beneficiaries.<sup>1</sup> The same view is related from Anas b. Mālik and Sa'īd b. al-Musayyib.<sup>2</sup> In the later time Ibrāhīm Nakha'ī, Muḥammad b. 'Alī Abū Ja'far and Ḥammād followed the same view.<sup>3</sup>

It seems that the theory of al-māl al-zāhir (checkable property) and al-māl al-bāṭin (uncheckable property) which appeared to be adopted by the later jurists, originated perhaps during the period under discussion owing to the above circumstances and situations. According to this theory the later jurists had generally given their judgement in favour of handing over zakāt of the checkable property to the government, while the zakāt of uncheckable property should be spent directly on the beneficiaries.<sup>4</sup>

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Another controversial topic among the private circles of jurists, during the period under discussion, was the problem of zakāt on silver or gold jewellery. A specific rate on gold and silver itself had already been fixed during the Prophet's time.<sup>5</sup>

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1. San., IV, 48.

2. Ibid., 49.

3. Ibid., 48.

4. Infra, ch.IV, pp. 183-5

5. Supra, ch.I, p. 57.

But the problem which had become controversial now, was the issue of whether the jewellery made from gold and silver could be considered as al-‘ayn (gold/silver metal or coin) and subject to zakāt or whether it would be taken as domestic goods and hence totally exempted. In this regard, probably the jurists of Iraq had a precedent of ‘Abd Allah b. Mas‘ūd, the teacher of the many eminent jurists of Iraq at that time. He reportedly had instructed his wife to pay zakāt on her jewellery at the rate of  $\frac{1}{2}$  mithqāl out of 20 mithqāl.<sup>1</sup> This precedent perhaps had provided grounds for the jurists on which they could argue in favour of levying zakāt on the jewellery made from gold and silver, considering it as al-‘ayn like dirham and dīnār, which were also made from silver and gold respectively. This is the reason that almost all the eminent jurists of Iraq like ‘Alqama (d. 42 A.H.), and ‘Abd Allāh b. Shaddād (d. 82 A.H.), Sa‘īd b. Jubayr (d. 94 A.H.), Jābir b. Zayd (d. 93 A.H.) and Ibrāhīm Nakha‘ī (d. 93 A.H.) reportedly had held the same view.<sup>2</sup> However, it appears that in Hijāz the situation was rather different. There was no clear precedent either in the practices of Medinan Caliphs or from any other central figure. Hence, this might have been a matter of difference among the jurists of the region. Mālik related a report in al-Muwatta’ that ‘Āi’sha never paid zakāt on the jewellery of her orphan nieces, who were put in her care.<sup>3</sup> Furthermore, Ṣaḥānī mentioned a report from one of her nieces, ‘Amra b. ‘Abd al-Rahmān. According to

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1. Ath.Y., 89; Ath.Sh., 95; San., IV, 83; Amw., 440.

2. Ibid.

3. Muw.Y. I, 191; Muw.Sh., 116.

which when she asked 'Ā'isha about zakāt on her jewellery, she replied in the negative.<sup>1</sup> The above reports indicate that 'Ā'isha considered jewellery as totally exempt from zakāt. Yet both of the above remarks in fact do not provide sufficient evidence to conclude her juristic view in this regard, because it is possible that the ornaments of her nieces might have been made from some other metals, or even if they had been partially made from gold or silver, the portion of gold and silver used in them might be less in weight and might not have reached the minimum zakātable amount of gold and silver. The last possible reason can also be supported by a report of Ṣan'ānī from Qāsim b. Muḥammad, an eminent jurist of Medina and a nephew of 'Ā'isha. According to that report, he made it clear that though his cousins' ornaments were made of gold and pearls, in those days such ornaments were very light in weight and hence she never paid zakāt on them.<sup>2</sup> Therefore, as far as 'Ā'isha was concerned, nothing could be safely proved from her in this connection. However, another juristic personality of Hijāz at that time, who was a younger Companion of the Prophet, 'Abd Allāh b. 'Umar (d. 74 A.H.) probably considered jewellery, even if it were made from gold and silver, as totally exempt from zakāt. Not only is there a clear fatwā (judgement) reported from him: Laysa fī al-hallī zakāt (no zakāt is obligatory on ornaments)<sup>3</sup> but there is also a report from Nāfi', one of his mawālī, which confirms that he used to give the

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1. San., IV, 83.

2. Ibid.

3. Ibid., 82; Mus.Sh., IV, 37.

gold and silver ornament to his daughter and slave girls but he never paid zakāt on them.<sup>1</sup>

In contradiction to 'Abd Allāh b. 'Umar it is reported that 'Abd Allāh b. 'Amr b. al-'Āṣ (d. 65 A.H.) used to give his daughters gold and silver jewellery, the value of which was often more than 200 dirham and he regularly paid zakāt on it.<sup>2</sup> Jābir b. 'Abd Allāh (d. 72 A.H.), Qāsim b. Muḥammad (d. 108 A.H.) and Tā'ūs also reportedly held the view in favour of exemption of jewellery from zakāt.<sup>3</sup>

It appears that in the beginning people in Hijāz would not have been used to heavy jewellery totally made from gold and silver. If gold and silver were used in the jewellery it generally might have been so light that it could be neglected in case of zakāt like the general domestic goods and dresses etc. But in the later time (perhaps in the period after the death of 'Ā'isha), the heavy jewellery totally made from gold and silver would have become in use and fashion, so that people began to possess it as a form of wealth and saving. Hence, the question would have been raised as to whether jewellery made from gold and silver would be included legally among the domestic goods like dresses, etc., and would be totally exempt from zakāt or <sup>whether</sup> it would be considered as al-'ayn like dirham and dīnār and hence, would be subject to zakāt. Consequently the jurists would have been divided on the issue and some would have declared the jewellery of any kind as totally

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1. Muw.Y., I, 191; Muw.Sh., 116; San., IV,

2. San., IV, 84; Amw., 440.

3. San., IV, 82.

exempted from zakāt, while the others considered jewellery made from gold and silver as subject to zakāt.

Apart from the division of the opinions on that issue, there seems to be some evidence for jurists of this period developing new positions and sometimes changing their views. Therefore it is quite possible that a jurist, first held a view on a certain problem which he expressed to his students, but later he considered the problem and changed his former view. Thus, varying opinions on a particular issue would have been circulated among the people which were attributed to a single authority. This may be the explanation for the fact that, for the period under discussion, our sources contain some contradictory judgements about the above-mentioned issue attributing them to a single authority. For instance, the following three contradictory judgements (fatawā) are attributed to Sa'īd b. al-Musayyib (d. 94 A.H.), an eminent jurist of Medina during the time.

(1) "The act of wearing jewellery or its being lent to others would itself be considered equivalent to (the payment of) zakāt." <sup>1</sup> This statement indicates that Sa'īd considered jewellery as exempt from the obligatory zakāt.

(2) "Zakāt would be levied on gold and silver jewellery every year." According to this report 'Abd al-Hamīd b. Jubayr asked Sa'īd b. al-Musayyib

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1. Mus.Sh., IV, 28; Mus.Sh., IV, 28. Amw., 443. His exact words are "زكاة الحلي يعار ويلبس"

about zakāt on gold and silver jewellery, he replied in the affirmative. On being asked again idhan yafnī (even if its zakāt leads to the depletion of the jewellery), Sa'īd had replied wa law (Yes even if it does so).<sup>1</sup>

- (3) "The jewellery which is used constantly would be exempt from zakāt, however, the rest of the jewellery which is not used by the owner but instead kept by him as wealth and savings, would be subject to zakāt."<sup>2</sup>

The above mentioned three opinions, attributed to Sa'īd b. al-Musayyib which apparently seems to be contradictory, may show the different stages by which Sa'īd formed his final opinion on the problem. Probably first he would have been inclined to the total exemption of the jewellery from zakāt, considering it as a part of women's dress. But afterwards when he found that the possession of the precious jewellery of gold and silver had become a fashion and was hoarded by people as wealth and savings, he felt that its total exemption from zakāt meant keeping away a highly precious part of wealth and individual property from zakāt. This compelled Sa'īd to change his former view and he declared the jewellery of gold and silver as subject to zakāt. But after some time he would have to change his view again,

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1. San., IV, 84.

2. Amw., 443.

looking at the unproductive nature of the wealth in the form of jewellery and in consideration of several questions which would have arisen among the people in this regard as the above mentioned question idhan yafnī etc. Hence he came to a final conclusion that the jewellery should be divided into two categories, the jewellery in use of the owner and the jewellery possessed as a wealth and saving. The first mentioned jewellery was regarded by him as totally exempt having been considered as unproductive wealth and a part of women's dress while the other was declared as subject to zakāt as being wealth like dirham and dīnār.<sup>1</sup>

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Beside jewellery, another ijtihādīc controversy of the period was related to the problem of zakāt on orphans' property. This problem had originated in the time of the older Companions when 'Umar b. al-Khaṭṭāb had instructed the people to invest orphans' property in some paying concern so that since it would be reduced by the annual levy of zakāt it might also yield some return.<sup>2</sup>

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1. This assertion is also supported by the fact that during the period of the Successor Jurists (the later part of Sa'īd's life) a theory had become prevalent among the jurists that the wealth which has actually been productive or at least has the quality of productiveness by nature must be regarded as subject to zakāt. Infra, ch.IV, pp. 187-8.
2. Supra, ch.II, p. 121.



This was the case in Hijāz but, at the same time in Kūfa, 'Abd Allah b. Mas'ūd, 'Umar's zakāt executive was not charging any zakāt at all on orphans' property, having considered the case from the viewpoint of orphans' benefit; for, if zakāt were to be levied annually on a minor's property, he would consequently have to face poverty at the start of his independent economic struggle. Therefore, he declared the orphan's property as completely exempt from zakāt until he came of age.<sup>1</sup>

The outcome of the different interpretations of the law in the different regions of the state resulted later during the period under discussion in ijtihādīc disputes among the jurists. Some jurists looking back to the practice of 'Umar declared orphan's property as subject to zakāt, while some others followed the view of 'Abd Allah b. Mas'ūd in this regard. As the jurists of Hijāz were more familiar with the practices of 'Umar, they were generally inclined to the first view. Ā'isha<sup>2</sup>, Jābir b. 'Abd Allah<sup>3</sup> and 'Abd Allah b. 'Umar<sup>4</sup> were reported to have given fatawā in favour of zakāt on orphans' property. Tā'ūs (d. 106 A.H.) and 'Atā' (d. 114 A.H.) in later times also followed the same view.<sup>5</sup> The Iraqi jurists due to the reason that they were more familiar with the views and practices of 'Abd Allah b. Mas'ūd, adopted the view that an orphan's property was exempt from zakāt. The fatawā which are attributed in this regard to Shurayh

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1. Supra, ch.II, 225.

2. Muw.Y., I, 192; San., IV, 66-7; Amw., 451.

3. San., IV, 66; Mus.Sh., IV, 25; Amw., 451.

4. San., IV, 69-70; Mus.Sh., IV, 25; Amw., 451.

5. Mus.Sh., IV, 25; Amw., 451.

(d. 75 A.H.)<sup>1</sup> 'Āsim (d.     A.H.), Sha'bī (d. 103 A.H.)<sup>2</sup> and Ibrāhīm Nakha'ī<sup>3</sup> confirm this assertion.

It seems that at a later time both of the above mentioned views became widespread in the various regions, hence some new views concerning the matter were to be evolved. This can be discerned from the reports attributed to Ḥasan al-Baṣrī (d. 110 A.H.) who declared that the part of an orphan's property which includes agricultural produce and animal wealth would remain subject to zakāt but the other part of an orphan's property would be exempt from zakāt,<sup>4</sup> while Mujāhid (d. 103 A.H.) held the view that the parts of the wealth which have been sāmī (devoid of productivity) would be exempt, while the rest would be subject to zakāt.<sup>5</sup>

The discussion on the above mentioned problem indicates that the doctrine of maṣlaḥa (social benefit) and natural justice were still playing their role in the developing ijtihādic activities and in the evolving fatawā of the jurists during the time under discussion.

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In the above lines we have presented a picture of the process of ijtihād in the realm of zakāt laws, which could be

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1. Ibn Ḥazm, al-Muḥallā (Beirut, n.d.), vol.V, p.205.
  2. San., IV, 69; Mus.Sh., IV, 25; Amw., 453.
  3. Ath.Y., 92; Ath.Sh., 94; San., IV, 69; Mus.Sh., IV, 25.
  4. Amw., 453.
  5. Ibid.

continued during the period under discussion even in the apparently unfavourable conditions and situations of the society. As compared to the preceding period of the older Companions, it appears that during this period of younger Companions, the process of ijtihād and law making had fundamentally changed. At the beginning of this period, the process appears to have begun to escape from the hands of the government, so that by the middle of the period it had been completely transferred to the jurists outside the government. However, the ijtihādic activities that were at work by individual jurists took place without the authority of political and central control. This vacuum could not be filled during the period under discussion. Although a few images of some religious authorities were evolving at the local level, no central figure had emerged nor was any institution established that could consolidate the widespread ijtihādic activities which were at work among individual jurists. Therefore, on the new issues of the time, individual ijtihād and personal fatawā rather than collective ijtihād and unanimous decisions were in vogue.

However, the above study indicates that as far as the jurists of any one locality are concerned, they generally held similar views on the problem, perhaps due to an easy access to mutual exchange of views. Here it can also be inferred that if any central link or any system of mutual consultation among the jurists of different regions could have been established, then the situation would have been different.

Anyway in the absence of a central link or any organising authority and in spite of the prevalence of personal judgements

(fatāwā) from the jurists, the factor that united the religious law and saved it from complete disintegration was basically the unanimous sources of ijtihād.

Similar to the preceding period, the following two sources were taken by all the jurists, irrespective of the regions to which they belonged, as the basic sources which held binding force for all the ijtihādic activities related to zakāt laws.

- (1) The Qur'ān.
- (2) The laws of the Prophet's time, his statements and practices regarding zakāt law.

As far as the first source, the Qur'ān, is concerned, we have already explained in the second chapter that it had been preserved in the form of a written book as well as in the memories of al-Qurrā' (reciters). But the second mentioned source, the prophetic laws, could not be codified like the Qur'ān, therefore the only way to reach the second source was through the Companions of the Prophet who, now, had spread and settled in the far and distant parts of the newly-acquired territories. The details of the laws which were enforced in the Prophet's time and his relevant explanations were either preserved in their memories or some details could be traced from the manuscripts of the Prophet's letters that were still reportedly preserved by some Companions.<sup>1</sup>

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1. See San., IV, 6-7.

In both the cases, it is clear that those Prophetic laws which had gradually evolved during his twenty-three years of prophethood with all their relevant details, could not be preserved in one place or in the memory of any one Companion. But, instead, some details might have been found from some Companions while the other details would have to be traced from other Companions. Likewise, some Companions might have had the knowledge of the early stages while others would have had the details of some later stages. In every case it can safely be assumed that during the period under discussion, the process of ijtihād through deduction or derivation from the second mentioned source, sometimes might have provided varied and contradictory results, instead of corresponding and agreed conclusions. Hence the developing law was affected by the problem of conflicts inside the law. This could not have happened in the time of the older Companions because of several countering factors. At that time, most of the distinguished Companions who might have had any juristic calibre were residing at Medina.<sup>1</sup> A central link between all the ijtihādic activities and personal judgements of the jurists was also maintained by the religious leadership of caliphs. The emphasis on the mutual consultation in all ijtihādic matters not only diminished the chances of conflicts in the practical laws but also brought the variety of personal judgements under a process of consideration, refinement and agreement before the final decisions were reached. However, as appears from the above study, the situation during the period

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1. Supra, p. 146.

under discussion had completely changed. A long period had elapsed since the death of the Prophet, most of his older Companions had already died, and the younger Companions were now scattered far and wide. The rulers were no longer regarded as the religious leaders, rather they were the rulers by virtue of the political powers which they held in the society. The process of mutual consultation could not be retained and there was no link or any central organisation which could control these ijtihādic activities which were at work among the jurists individually. Therefore it was quite natural that the outcome of deduction and derivation from the above mentioned second source would be varied.

Apart from the above two authoritative sources, the third and fourth sources for ijtihād were: the precedents of the time of the Early Caliphs (generally the first three) and the individual reasoning and opinions of the jurists themselves. It is obvious that these sources could not be held as authoritative and binding as was the case with regard to the first two sources. We have seen several examples of the abandonment of the old practices like re-exemption of horses from zakāt etc., in the time of 'Alī and renunciation of 'Umar's practice in this regard.<sup>1</sup>

However, it appears that there was a growing trend among the jurists that, to solve the new problems, they should not rely only on their own opinion (ra'y) if they could not get anything from the first two sources, they should try to find

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1. Supra, pp. 154-5.

some precedent from the time of the early caliphs to support their views. It is obvious that this trend eventually would restrict the sphere of ijtihād within a narrower circle. It is not surprising, therefore, that the ijtihādic activity of the period of the Younger Companions, if compared with the preceding time of the Older Companions, seems to have become much more limited. However, as will be discussed in the fourth chapter, this position changed during the time of the Successor jurists when the situation and circumstances had become more conducive for juristic/ijtihādic activities.

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## CHAPTER IV

### THE PERIOD OF THE SUCCESSOR JURISTS

(73 A.H./692 A.D. - 101 A.H./720 A.D.)

The time under discussion in this chapter covers the period of twenty seven years, commencing from the assassination of 'Abd Allāh b. al-Zubayr in 73 A.H. till the death of 'Umar b. 'Abd al-'Azīz in 101 A.H. This time is named above as the period of the Successor Jurists, it is because of the fact that the practical leadership of juristic activities at that time was transferred to those who mostly belonged to the class of the Successors, that is the generation which did not enjoy the immediate company of the Prophet. However, they acquired knowledge of theology and law from those close Companions of the Prophet who survived long after his death. It is true that a few of those who, in the common terminology, are called as Companions of the Prophet, survived into that period. However, the most significant figures in religion and jurisprudence were among the class of the Successors. These include such figures as, in Medina, Sa'īd al-Musayyib (d. 94 A.H.), 'Urwa b. al-Zubayr (d. 94 A.H.), Abū Bakr b. 'Abd al-Rahmān (d. 94 A.H.) 'Alī b. Husayn (d. 94 A.H.), 'Ubayd Allāh b. 'Abd Allāh b. 'Utba b. Mas'ūd (d. 98 A.H.) Khārija b. Zayd b. Thābit (d. 99 A.H.), Sulaymān b. Yasār (d. 107 A.H.), Qāsim b. Muḥammad (d. 108 A.H.), Sālīm b. 'Abd Allāh (d. 106 A.H.), Nāfi' (d. 117 A.H.) and Abū Ja'far Muḥammad b. 'Alī b. Husayn al-Bāqir (d. 114 A.H.). In Mecca 'Ikrima (d. 107 A.H.), Mujāhid b. Jabr (d. 103 A.H.) and

'Atā' b. Abī Rabāh (d. 114 A.H.) were the distinguished authorities and in Yemen Ṭā'us (d. 106 A.H.) was an eminent figure. In Irāq, although, 'Alqama and Masrūq, the two famous students of Ibn Mas'ūd had already died,<sup>1</sup> there were still Ibrāhim Nakha'ī (d. 95 A.H.), Aswad b. Yazīd Nakha'ī (d. 95 A.H.), Sha'bī (d. 103 A.H.), Sa'īd b. Jubayr (d. 103 A.H.), Anas b. Mālīk (d. 93 A.H.), Muḥammad b. Sīrīn (d. 110 A.H.), Jābir b. Zayd (d. 93 A.H.) Qatāda b. Di'āma (d. 118 A.H.) and Ḥasan al-Baṣrī (d. 110 A.H.). Of the above mentioned personalities, except Anas b. Mālīk who was a Companion, the rest were from the Successors.

During the above mentioned period of the Successor jurists the rulers were 'Abd al-Malik until 86 A.H., his son Walīd from 86 A.H. to 96 A.H., another son Sulaymān from 96 to 99 A.H. and his nephew, 'Umar b. 'Abd al-'Azīz from 99 to 101 A.H. In comparison to the preceding time, this entire period seems to be politically rather peaceful and stable. It appears that after the death of Ibn al-Zubayr in the year 73 A.H., all the important opposition groups against the government of Damascus had been quietened. Although some insignificant and disorganised intrigues on the part of Khārijites can be found during this time, there is no substantial movement against the government of Damascus. In general, if we can assume the preceding time as a transitional period between Caliphate and Monarchy, in which several political ideas were in open conflict for ultimate supremacy, this transitional conflict seems to have ceased in the period under discussion. And now in the words of Bernard

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1. 'Alqama b. Qays b. 'Abd Allāh, Abū Shibl died in 61 A.H. Masrūq b. al-Ajda' al-Hamadānī (d. 63 A.H.)

Lewis "a centralised monarchy, modified by Arab traditions and by the remnants of theocratic idea, had become established."<sup>1</sup>

As far as juristic and *ijtihādīc* activities are concerned the real field for them was still the private sector, as in the preceding period - individual *ijtihādāt* in place of collective ones and private *fatawā* instead of agreed or official decisions. However there is ample grounds to assume that during the period under discussion the gulf between the '*ulamā*' and the government had become much narrower. Apart from the political peace, another reason for this might have been the fact that the founder of this period was 'Abd al-Malik, who himself was not only an '*ālīm* but, after getting control over the affairs of the state had adopted a policy of having close contacts with the religious scholars and consulting them from time to time. Hence, during his time Qubaysa b. Zu'ayb (d. 86 A.H.) a significant scholar can be seen as a personal adviser or as a minister of state in the royal court.<sup>2</sup> However, with regard to bringing the scholars closer to the government, the major credit should be given to 'Abd al-Malik's nephew and son-in-law 'Umar b. 'Abd al-'Azīz. He, long before the time of his own caliphate, in the very early days of Walīd's reign in the year 87 A.H., was appointed governor of *Hijāz* (Mecca and Medina).<sup>3</sup> The appointment of this young prince to this post was widely acclaimed among the learned circles of Medina.<sup>4</sup> It was perhaps

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1. *The Arabs in History* (London, 1966), p.75.

2. I. Sa'd., V, 176.

3. *Tab.*, VI, 427-8.

4. *Ibid.*

due to the fact that his personality was not alien to them because he had been educated in Medina and had spent his early days at the feet of the scholars in the Prophet's mosque. In addition, the personal character of 'Umar b. 'Abd al-'Azīz, his own academic status and attitude towards the scholars whom he involved in mutual consultation in the affairs of state, resulted in close contacts between them. This is supported by reports which suggest that 'Umar b. 'Abd al-'Azīz, soon after coming to Medina as governor, constituted an advisory committee comprising of ten distinguished jurists, who, besides juristic affairs, also contributed in the management of affairs of state.<sup>1</sup> Although it is uncertain how and to what extent this committee really functioned, it can safely be concluded that such an approach would have been instrumental in bringing the scholars nearer to the government. However, on this point it should be borne in mind that Ḥajjāj b. Yūsuf (d. 95 A.H.) was ruling Irāq at the same time. So it is very likely that the situation in Iraq was quite different to that in Hijāz. After the latter's death, the situation must have been changed. This would seem to be particularly the case since when the reign of Sulaymān began in the year 96 A.H.,

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1. I. Sa'd, V, 334; Tab., IV, 427-8. The members of this committee were the following: 'Urwa, 'Ubayd Allāh b. 'Abd Allāh, Abū Bakr b. 'Abd al-Rahmān, Abū Bakr b. Sulaymān, Sulayman b. Yasār, Qāsim b. Muḥammad, Sālīm b. 'Abd Allāh b. 'Umar, 'Abd Allāh b. 'Abd Allāh b. 'Umar, 'Abd Allāh b. 'Āmir and Khārīja b. Zayd.

'Umar b. 'Abd al-'Azīz had acquired considerable power and influence at the centre to the extent that he was nominated by Sulaymān as his successor and after his death the caliphate eventually fell into his hands.<sup>1</sup> After this, the two and a half years of his reign (from 99 A.H. to 101 A.H.) should be regarded as the most significant period of collaboration between the state and the 'ulamā' in respect to progress in fiqh (law) and ijtihād. Moreover, it would not be wrong to suggest that during the brief period of his caliphate there was a significant transfer of power from the hands of civil and military leaders to the hands of the jurists and scholars.

With regard to the ijtihādic development in zakāt law, first it is necessary to mention that almost all those ijtihādic issues originated in the time of the younger Companions remained as the focus of attention among the jurists of this period. Hence, the question as to whether it is incumbent on a Muslim to hand over his zakāt in all circumstances to the government only or whether it could also be given directly to the beneficiaries, remained under discussion among the jurists of this period as well. We have already explained in the third chapter the circumstances during the period of the Younger Companions in which the issue originated and how the jurists of that time held different views in this regard.<sup>2</sup> Some held the view that collection of zakāt and its spending on its definite heads was a responsibility of the government. Therefore, in all circumstances

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1. Tab., VI, 550-1.

2. Supra, pp. 161-4.

it should be handed over to the government and accordingly if a person, instead of handing his zakāt over to the government, paid directly to the beneficiaries, then it would be obligatory on him to repay his zakāt to the government. On the other hand, some other jurists upheld the stand that in some special circumstances, such as they were in at that time, instead of handing the zakāt over to the government, it could be given to the beneficiaries directly. However, as we have already indicated in the previous chapter, the upholders of the second view were not in fact suggesting that people should totally avoid the payment of zakāt to the government but, rather their main stand was only that zakāt on such wealth, which is within the knowledge of the government and hence could be effectively collected by it, has to be paid, but that the hidden property on which the collectors are unable to levy zakāt by themselves, instead being declared to the government could be assessed by the people themselves and paid directly to the beneficiaries.<sup>1</sup>

As a result of these circumstances a trend towards categorisation of zakātable wealth into "the known" and "the hidden" was taking shape within the religious law of zakāt. This trend appears to have become an accepted theory among the jurists until the middle of the period under discussion. According to this theory al-harth (agricultural produce) and al-māshiya (livestock) were named as al-amwāl al-zāhira (the known property) while al-‘ayn (silver, gold and cash) was termed as al-māl

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1. Supra, pp. 163-4.

al-sāmit or al-māl al-bāṭin. Admitting the sole domain of the government with regards to al-amwāl al-zāhira, the jurists of the Successor's time generally held the view that in respect of al-māl al-bāṭin a Muslim is only obliged to pay his zakāt voluntarily as in the case of the obligatory duty of ṣalāt (prayer) and in this regard the government should not exercise any compulsion. Therefore a person, if he wishes, can pay the zakāt of his al-māl al-bāṭin to the beneficiaries directly without any intermediation of the government. This view can clearly be concluded from the statements and fatawā attributed to Sa'īd b. Musayyib (d. 94 A.H.), Muḥammad al-Bāqir (d. 114 A.H.), Nakha'ī (d. 95 A.H.), Ḥasan Baṣrī (d. 110 A.H.), Tā'ūs (d. 106 A.H.), Makḥūl (d. 112 A.H.), Ḥammād (d. 120 A.H.), Maymūn b. Mihrān, (d. 117 A.H.), Sha'bī (d. 103 A.H.) and Anas b. Mālīk (d. 93 A.H.)<sup>1</sup>

However, under that definition merchandise should be regarded as coming under <sup>the</sup> category of al-māl al-bāṭin. Yet several reports suggest that the past practice of appointing the 'āshirīn on the important trading routes and bridges was continued by the state during this period. These 'āshirīn, apart from their other duties, were also responsible for levying zakāt on the merchandise of Muslim traders according to the specified rates.<sup>2</sup> Their authority in this regard was also accepted by the jurists of the time.<sup>3</sup> Thus it can be inferred

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1. San., IV, 47-8; Mus.Sh., IV, 29; Amw., 572-5.

2. Ath.Y., 90; Muw.Y., I, 194; Khi.Y., 147-8. Amw., 537.

3. Mus.Sh., IV, 34; Amw., 573.



that in the above situation merchandise, since it was checkable by the 'āshirīn was converted in the terms of law from the category of al-māl al-bāṭin to the category of al-māl al-zāhir.

Anyway in the case of all other al-amwāl al-bāṭina the jurists of that time, admitting the power of voluntary assessment for the people, gave them a choice of paying zakāt on it to the beneficiaries directly.<sup>1</sup> The same doctrine of the voluntary assessment of zakāt on al-amwāl al-bāṭina must have led jurists like Qatāda (d. 118 A.H.) and Tā'ūs to give a decision prohibiting the government from taking an oath from a zakāt payer to the effect that he did not possess any property except that which he had already declared.<sup>2</sup>

The same theory of categorisation of the properties into al-māl al-zāhir and al-māl al-bāṭin also had some influence on other issues of the zakāt law. Thus zakāt on orphans' property had been a disputed issue among the jurists of Hijāz and Iraq during the preceding time. Now, we find some Successor jurists such as Ḥasan al-Baṣrī and Mujāhid holding another view in this regard. According to them, the properties in the possession of an orphan consisting of al-ḥarth or al-māshiya were regarded as subject to zakāt annually, while al-māl al-sāmī in the orphan's inheritance still remained exempt until the time of his majority.<sup>3</sup> It is very clear that the above mentioned theory of the categorisation of wealth had some influence on the above case,

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1. Ibid.

2. San., IV, 149-50.

3. Amw., 453.

As regards the category of al-amwāl al-zāhira, the government was given a free hand to levy zakāt, irrespective of whether the properties were owned by a minor or an independant major, while in respect of the second category, i.e., al-māl al-bāṭin perhaps keeping in view the interest of the orphan, the guardian was not obliged to pay zakāt on his behalf.

Apart from the above mentioned ijtihādic discussion, another problem which originated during the preceding time and remained as an issue among the Successor jurists was the problem of zakāt on the jewellery made from gold and silver. On this problem also the jurists of Hijāz and Iraq had held two contradictory views.<sup>1</sup> During the Successor's time, however, it appears that some jurists were trying to eliminate the differences and contradictions in this regard. Hence, Sa'īd b. al-Musayyib appeared to present a conciliatory view on the above mentioned problem. At first, as we have noted in the last chapter, he was in favour of exempting all kinds of jewellery (except commercial) from zakāt. But later on, he changed his view and adopted a new stand which can be taken as intermediate between the Hijāzis and Iraqī's stand on this issue.<sup>2</sup> His new stand was that all the jewellery that is in the constant use of the owner should remain exempt from zakāt like all other domestic wares, but the rest of the jewellery which is kept by the owner as a saving would be subject to zakāt every year.<sup>3</sup> If we take

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1. Supra, ch. III, pp. 164-8.

2. Supra, pp. 168-9.

3. Amw., 443.

this view of Sa'īd b. al-Musayyib about the jewellery together with the view of Ḥasan and Mujāhid regarding the orphans' property, then we can arrive at another theory concerning zakatable property, which seemed to be developing simultaneously among the jurists of the Successors' time. This theory explains that the property which is productive in quality or at least capable of production is liable to zakāt. Hence, we find that the jurists of the Successors' time seem to have followed this theory so that they exempted the jewellery in constant use by the owner and also al-māl al-sāmit of the orphan due to its lying dormant. While the jewellery which was not in constant use and was kept as a form of saving and wealth, being regarded as having the quality of production through the possibility of increased value was considered subject to zakāt every year. Similarly, al-ḥarth and al-māshiya of the orphan, since they possessed the quality of production were regarded as subject to zakāt. Therefore it is quite possible that the jurists, in their above quoted fatawā, followed the principle that any property which is naturally productive or had the quality of production would be regarded as subject to zakāt annually. The same principle could also be inferred from the practice of the Prophet and the ijtihādāt and precedents of the Companions' time. We have seen that in the Prophet's time, domestic wares were totally exempt from zakāt, while al-māshiya and al-ʿayn were subject to annual zakāt, perhaps due to their natural growth and productivity. On the other hand, al-ḥarth was levied only at the time of harvest, and was otherwise totally exempt even if the yield was retained by the owners for several years. Afterwards we find ʿUmar b. al-Khaṭṭāb instructing

guardians to invest the property of the orphan in a paying concern and to pay its annual zakāt as well.<sup>1</sup> On the other hand, we observe 'Abd Allah b. Mas'ūd adopting a different approach by exempting the orphan's property until his maturity.<sup>2</sup> Both these views, though apparently conflicting, were in fact pointing towards the principle that in order to determine the obligation of zakāt on any property, the productivity of wealth should be taken as the primary condition. Therefore in the light of this background the emergence of the above theory and its general acceptance among the jurists of the Successors' time should not be surprising. Probably it was only on the ground of this theory that Sa'īd b. al-Musayyib had to give up his old view in the case of zakāt on jewellery and adopted the new stand which confirms with this theory. Similarly, the stand of Ḥasan al-Basrī and Mujāhid who considered it necessary to exempt al-māl al-ṣāmit of an orphan which remained in the usual conditions deprived of productivity, while they regarded the rest (al-ḥarth and al-māshiya) as zakātable since it was productive by nature, was also in accordance with this theory. How this theory was in fact influencing the view of contemporary jurists can be judged from the reports that Sha'bī appeared to distinguish between al-tājir al-mudīr<sup>3</sup> and al-tājir al-muhtakir<sup>4</sup> with regard

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1. Supra, ch. II, p. 121.

2. Ibid.

3. A trader whose merchandise was in regular transaction of sale/purchase during the zakāt year.

4. A trader who kept back his merchandise, waiting for a reasonable price. In this case the merchandise might be lying dormant, without there being any actual transaction of sale/purchase for several years.

to the obligation of paying annual zakāt on merchandise. The former was declared by him to be subject to zakāt annually while the latter was only obligated to pay zakāt during that year in which the merchandise actually went through the transaction of sale/purchase.<sup>1</sup> The same view can also be attributed to Tā'us.<sup>2</sup> Moreover, it also appears that the same theory, later during the time of 'Umar b. 'Abd al-'Azīz had some effect on the problem of zakāt on al-māl al-dimār,<sup>3</sup> when it was finally enacted that al-māl al-dimār was regarded as exempt from zakāt in respect of the past years, during which the owner though possessing legal ownership, did not in fact have the property in his actual possession or control and hence was denied the benefits of its production.<sup>4</sup>

The above two issues, namely the question of zakāt on merchandise and the problem of al-māl al-dimār, also reflect some other aspects of the legal development that will be dealt with later in a more elaborate form.<sup>5</sup> Yet, at this point, it seems appropriate to emphasise that both general theories which have already been discussed above, categorising properties into two classes al-zāhira (checkable) and al-bāṭina and taking the quality of productivity as a primary condition for the obligation

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1. San., IV, 95.

2. Ibid.

3. A property which was out of control of its owner for a specific period.

4. Muw., I, 193; San., IV, 103-4; Mus.Sh., IV, 53.

5. Infra, pp. 203-8; and pp. 217-8.

of zakāt represent a specific tendency within the legal development during the period of the Successors. This tendency was towards evolving and formulising general theories and principles which could be applied to the derivative details and branches of the zakāt law in general. This trend must have given rise to some technical difficulties in the application of the general theories and principles, such as we have seen in the cases of al-tājir al-mudīr and al-tājir al-muhtakir and in the case of al-māl al-dimār. These technicalities can also be seen in the application of another general principle which had already been evolved at the beginning of the period under discussion. This principle was based on a theory that the elapse of one ḥawl (zakāt year) must be regarded as an essential condition for the obligation of zakāt on any property. The application of the principle in the case of those savings which a man possesses from the beginning of the ḥawl (zakāt year) was very simple. However, its application on al-māl al-mustafād (the incomes earned during the ḥawl itself) was rather cumbersome and consequently posed several technical questions in this regard. Some jurists of the Successors' time seem to have made some attempt to deal with these problems and they have suggested different ways of applying the above principle to different kinds of properties. But in order to perceive the exact technicalities and the jurists' response in this regard it is necessary first to look into the historical background in which the above principle of ḥawlān ḥawl (elapsing of one ḥawl) actually evolved. We know that in the Prophet's time zakāt on al-māshīya and al-ʿayn was being levied once a year at a definite time, while

on al-harth (agricultural produce) it was levied at the time of harvest. This practice, later on, during the time of the older Companions, developed somewhat differently. During the time of Abū Bakr and 'Uthmān, as we have mentioned in the second chapter,<sup>1</sup> it was a practice to ask the recipient of 'aṭāwā (military salaries or honoraria) whether or not he possessed, in addition to the 'aṭiya, another zakatable property, if so then a portion of the 'aṭiya equal to its zakāt was retained by the government. In the other case the entire 'aṭiya was handed over to him. This new development reflected an idea that zakāt on any property would be levied only after the elapse of one ḥawl. Consequently, during the time of the younger Companions, the fatawā which are attributed to 'Alī and 'Abd Allāh b. 'Umar (d. 74 A.H.) clearly indicate the above idea. Ṣan'ānī mentioned a report in this regard from 'Alī that he said "man istafād māl falays 'alayhi sadaqa hattā yaḥūl 'alayhi al-ḥawl" (the person who gained some wealth is not obliged to pay its zakāt until the zakāt year has elapsed.)<sup>2</sup>

Similarly, a report is narrated in al-Muwatta' that 'Abd Allāh b. 'Umar had also said "lā tajīb fī māl zakāt hattā yaḥūl alayhi al-ḥawl"<sup>3</sup> (zakāt is not levied on any property until the zakāt year has elapsed). Both the above fatawā indicate the

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1. Supra, ch. II, pp. 106-9.

2. San., IV, 75. This report is also mentioned by Ibn Ḥanbal and Abū 'Ubayd. See Mus.H., II, 311; Amw., 411.

3. Muw.Y., I, 189; Muw.Sh., 115. This report is also mentioned by Ṣan'ānī and Abū 'Ubayd. See respectively San., IV, 76; Amw., 411.



condition of the necessity of an elapse of the zakāt year before the obligation of paying zakāt on any property including the earnings during the year. Yet the fatawā are not very clear about the application of the above condition on the different kinds of wealth. For example, in the case of the income earned during the year these fatawā do not explain whether the words "hattā yahūl 'alayhi al-hawl" implies only, that zakāt is not obligatory on income at the time of earning, but instead it will be delayed till the time of the annual collection of zakāt or the above quoted words mean that for the above purpose an elapse of a complete year of ownership on each and every earning is regarded as an essential condition before payment. If we accept the second interpretation then the question will arise as to whether in case of earnings during the year the payment of zakāt will be required only after the elapse of a complete year and then be instantly required or whether it will be delayed to the following time of annual collection. In the case of instant payment it is very cumbersome to keep an account of the exact dates of completing a year for each item of income earned as well as an account of the exact amount, which remained with the owner after the elapse of one complete year of his ownership. This can not be regarded as practical. In the case of the second possibility of delayed payment, the question will arise as to whether at the time of the next collection zakāt will be paid only for one year or be paid for that excess period as well which would have passed up to the time of collection. Anyway, the fatawā of 'Alī and Ibn 'Umar seem to be very vague regarding their application, especially in the case of the income earned during the hawl

itself. As far as the available information is concerned it is not possible to determine with any certainty how the above fatāwā were implemented by their originators. However, as far as the practice of the government is concerned, apart from the brief period of 'Alī, various reports indicate that during the reign of Mu'awiya and the other Umayyad rulers after him, it was the usual practice to deduct the zakāt on the annual salaries at source.<sup>1</sup> This means that at least in the case of annual salaries the above principle of ḥawl was not applied during that time, in terms of the condition which imposes an elapse of a complete cycle of twelve months on each and every earning. According to some other reports the same way of deduction at source had already been practiced by 'Abd Allah b. Mas'ūd in Kūfa during the time of 'Umar and 'Uthmān.<sup>2</sup> Another interesting aspect of the above situation is a fatwā which is attributed to Ibn 'Abbas, an eminent jurist of the period of the Younger Companions "man istafād māl yuzakkīhi ḥīna yastafīduhu"<sup>3</sup> (the person who acquires property will have to pay its zakāt at the time he acquires it. If this report is taken to be correct, then, without involving any other conditions, the fatwā apparently shows that in the view of Ibn 'Abbās, income earned during the year, was not subject to the condition of ḥawl at all, and its

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1. For the practice of Mu'awiya in this regard, see Muw.Y., I, 189. For the practice of 'Umar b. 'Abd al-'Azīz see San., IV, 78. Report no. 7037.
  2. Amw., 412; San., IV, 78.
  3. San., IV, 78; Mus.Sh., IV, 30; Amw., 413.

zakāt was expected to be paid instantly.

This is the background to the technical problems which the jurists of the Successors' time were facing regarding the application of the principle of hawl in the case of the income earned during the hawl itself. As far as this fundamental question is concerned - whether or not the earnings during the year should be considered in principle as subject to the condition of hawl - it was possible to reply in both the affirmative and negative if the early precedents were followed. If the practice of Abū Bakr and 'Uthmān regarding the 'atāyā was to be followed and the above quoted fatawā of 'Alī and 'Abd Allāh b. 'Umar were to be considered as binding then the answer to this question was definitely in the affirmative. However, if the way of the zakāt deduction from the annual salaries which was practiced by 'Abd Allāh b. Mas'ūd, the zakāt executive and the general treasury official in Kūfa in 'Umar's time and the practice of Mu'awiya and other Umayyad rulers, who were deducting zakāt at source, was followed, then the answer of the question might also be given in one regard in the negative. However, if the fatwā of Ibn 'Abbās was to be followed literally then the answer to the question was definitely in the negative. However, it appears that the latter did not convince the jurists of the Successors' time for there does not appear to be any evidence in the primary sources, indicating that any of the Successor jurists literally followed the fatwā of Ibn 'Abbās, and totally excluded the earnings during the year from the condition of hawl, and treated the earnings as similar to al-rikāz (buried treasures) as subject to zakāt at source. It is quite possible that even Ibn 'Abbās himself may

have meant from the words "man istafād. mā"<sup>not</sup> any earning during the year but instead meant only the wealth which one happened to find from excavations.<sup>1</sup>

Anyway it appears that the jurists of the Successors' time generally accepted the condition of hawl in case of the earnings during the hawl as well. However, they differed as to how the condition would be applied on the different kinds of earning. Thus we find them suggesting different methods for its application in different cases of earnings with regard to different kinds of wealth.

As far as the zakāt of livestock is concerned, probably till the end of the period under discussion, the implementation of the condition of the hawl would only have applied in the sense that zakāt would not be charged at source in respect to the additions to the property during the year, but instead zakāt would be levied on the entire property of every zakāt payer at the time of annual collection irrespective of whether the property had been in his possession from the beginning of the year or had been added during the year. In this regard, it seems clear that such an idea as differentiation between additions through birth (i.e. of cattle) and additions through purchase, and the employment of it to regard additions through birth as zakātable at the first annual collection while allowing the second to be delayed until the passing of a complete cycle of twelve months, seems to be an ijtihādīc innovation of a much

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1. Abu 'Ubayd had also pointed out that Ibn 'Abbās perhaps meant by the above quoted words the zakāt on excavation. See Amw., 414.

later time.<sup>1</sup> Indeed this sort of differentiation can not be traced to any jurist of the Successors' time. This is also evident from the practice which was reportedly continued from the time of the Prophet till the period under discussion. Positive evidence in this regard can be deduced from the report which shows that once a zakāt collector put people's objection before 'Umar b. al-Khaṭṭab, saying: "Ta'uddu 'alaynā al-sakhla wa lā tākhudhuhā minnā" (you count the lambs in assessment but you do not accept them in zakāt). He then replied: "Even a new born lamb which is carried by the shepherd on his shoulder must be included in assessment as usual. Are they unaware of the fact that we take from them only the average animal, leaving the fine ones for them?"<sup>2</sup> This report is very clear in the case of the additions to livestock by means of birth. Similarly, in the case of additions by purchasing livestock, the above assertion can be supported by the report of Ṣan'ānī which shows that 'Irak b. Mālīk, a Successor jurist, went with some of his colleagues to the tribes of Juhayna and Ghifār<sup>3</sup> to investigate the practice regarding zakāt on livestock which had continued with them from the time of the Prophet till that period. According

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1. For a general description of this differentiation, see Ibn Qudāma, al-Mughnī (third edition, Cairo, 1367 A.H.) pp.616-7.
  2. Ath.Y., 86; Ath.Sh., 102; Muw.Y., I, p.199. San., IV, 10, 12.
  3. The tribes of the Prophet's time to the west of Medina and Mecca. Cf. Watt, Muhammad at Medina (Oxford, 1956), p.81.

to the report, on being asked whether, if a person has bought a few animals on a certain day and on the following the muṣaddiq comes to charge zakāt, the animals will be included for the purpose of zakāt assessment in the stock of the seller or the purchaser. They all unanimously replied that the animals will be included in the stock of the purchaser.<sup>1</sup> In this regard, further fatawā propounding the inclusion of the bought animals in the stock of the buyer instead of the seller for the purpose of zakāt assessment are also reported from 'Aṭā' and Zuhri, two other jurists of the Successors time.<sup>2</sup> Therefore it can be concluded that at least up to the period under discussion, in the application of the condition of hawl there was as yet no idea of differentiation between additions in livestock by birth and the addition by means of purchase. Rather, it seems that zakāt was charged annually at the appointed time on the total property of the owner, including all the additions.

Therefore, as far as the case of livestock is concerned, the application of the above principle of hawl until the period under discussion seems to be very simple and devoid of any complication. However, in the case of al-ʿayn, the situation seems to be rather different. In this case the application of the above principle in respect to the earnings during the year was leading to some real implementative complexities. This was not only because <sup>of</sup> the above mentioned precedents of the early time in this regard but also due to the fact that al-ʿayn being

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1. San., IV, 32.

2. Ibid.

assumed as al-māl al-bāṭin in that period was regarded by the jurists as subject to the purely private and voluntary zakāt assessment and payment that could be paid by the payer directly to the beneficiaries. This situation had broken the doctrine of uniform ḥawl (annual zakāt cycle) for all the members of the society in respect of all their zakātāble properties. Although the ḥawl for livestock and other checkable properties prescribed by the government still might have been uniform, the ḥawl in respect of al-‘ayn naturally must have been different for every individual. In this situation the jurists of the time were exercising their ijtihād in order to solve the problems which were arising in connection with the implementation of the condition of ḥawl in respect of the earnings and additions to the property during the ḥawl itself. Ibrāhīm Nakha‘ī (d. 95 A.H.), a jurist of that time, adopted a rather new, but more practicable view in this regard, attempting to reconcile the condition of the ḥawl and the practical difficulties in its application. His view was that if a person had either paid the zakāt of his al-‘ayn property in the previous year or become the owner of its zakātāble amount at the beginning of the current year, in both cases the earnings and additions to the property would be included for the purpose of zakāt assessment and at the end of the year zakāt would be required to be paid on his entire possessions, irrespective of whether part of the assets had been earned or added to the property during the year or whether part remained from the savings of the previous year, provided the total possessions in hand at the end of the year was equivalent to



the requirement of the minimum zakatable amount.<sup>1</sup> However, when a person had not paid zakāt on his al-‘ayn property for the previous year because his possessions were less than the minimum zakatable amount, and at the beginning of the current year he did not own the required amount, then the hawl (zakāt cycle) would start to be calculated from the time when he first became the owner of the minimum zakatable amount of al-‘ayn property. After an exact elapse of a complete cycle of twelve months, zakāt would be required to be paid on his entire possessions including the earnings during the hawl itself, provided that the possession at the end of the hawl met the requirement of the minimum zakatable amount.<sup>2</sup>

As compared to the case of livestock, this view of Ibrāhīm Nakha‘ī regarding the condition of hawl on al-‘ayn property differed only in the sense that in the case of livestock the zakāt collector did not need to investigate whether or not the owner had possessed the animals at the beginning of the hawl in the minimum zakatable number, fixed for the relevant kind of animal. The possession of animal property in the amount on which zakāt had to be paid at the time of collection was regarded as sufficient to levy zakāt. While in the case of al-‘ayn the view of Ibrāhīm Nakha‘ī reflects the idea that having the possessions at both ends of the hawl in the minimum zakatable amount would be considered for the purpose of zakāt as an elapse

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1. Ath.Y., 88; Amw., 415; Muw.Sh., 115.

2. Ibid.

of a complete ḥawl over the total possessions of a man including the earning and additions to the property during the ḥawl itself. This sort of possession which in the later time was termed as asḥl al-māl (basic wealth) or al-niṣāb (minimum zakātable amount)<sup>1</sup> eventually evolved in the form of a theory that was "ḥawl al-māl ḥawl aṣlihi aw niṣābihi"<sup>2</sup>. This theory implies that in terms of the law the zakāt cycle of asḥl will be regarded as the cycle of total property. As regards the above theory the question arose as to why the condition of asḥl or niṣāb (having the possession in the minimum zakātable amount) should not be applied to the complete ḥawl rather than to both ends of it only. This trend eventually directed some later jurists to extend the condition of niṣāb to every day of the ḥawl of twelve months.<sup>3</sup> These later developments are not in the purview of our study. Hence leaving aside the debates in this regard, it can safely be concluded that the above doctrine of Ibrahim Nakha'ī regarding the interpretation of the principle of ḥawl in the case of the earnings during the ḥawl itself was not only an intelligent deduction from the early conflicting precedents but was also an

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1. It appears that these terms only became prevalent among the jurists during the middle of the second century A.H. Abū 'Ubayd mentions that Layth, Mālik and the Medinans in general give it the name of niṣāb al-māl while the Iraqīs prefer to call it asḥl al-māl. See Amw., 409.
  2. Al-Zarqānī, Sharḥ 'alā al-Muwatta (Cairo, 1355/1936), vol.II, p.98.
  3. For the different views of later jurists on the problem, see al-Jazirī, Kitāb al-Fiqh 'alā al-Madhāhib al-Arba'a (Cairo, 1970), vol.I, pp.593-4.

attempt to reconcile the condition of hawl and the practical and technical difficulties towards its true application.

However, our sources indicate that the above doctrine of Ibrāhīm Nakha'ī was also opposed by some of his contemporaries. For example, Qāsim b. Muḥammad (d. 108 A.H.), a jurist of Medina, reportedly interpreted the condition of hawl very rigidly. He implied that a new hawl should start at the time of the acquisition of any earning or addition to the property and zakāt should only be required to be paid after an elapse of a complete cycle of twelve months over the time of its first acquisition.<sup>1</sup> However, the reports are very vague in this regard and give only an inadequate picture of his view and approach to the implementative details of this problem.<sup>2</sup>

During the same period, another rather astonishing opinion in this regard is attributed to al-Zuhrī (d. 124 A.H.), a comparatively younger jurist of that time. Abū 'Ubayd related a report showing that the view of al-Zuhrī was that if the total earnings and the additions to the property during the year were inclusively less than the remainder of the previous year, in that case only, the earnings and the additions during the year should be assimilated into the remainder of the previous hawl and zakāt would be required to be paid on the total possessions after completing the hawl over the remainder. While, if the earnings and the additions to the property during the year were inclusively more than the remainder of the previous year then

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1. Muw.Y., I, 189; San., IV, 75-6.

2. For the details, see Supra,

they should not be assimilated into the remainder for the purpose of zakāt and instead, the zakāt in respect of new earnings would be postponed until the next year.<sup>1</sup>

The above mentioned theory of al-Zuhri, though seemingly logical, appears, from the practical point of view, surprising in the sense that if a person during one year earns much, the zakāt in respect of his earnings will be postponed until the next year, while if his earnings become less during one year then he will also have to pay zakāt in respect of his earnings as well at the end of the current year.

All of the three above-mentioned views regarding the earnings during the year are related only to the property of al-‘ayn. We have already indicated in this regard that during the period under discussion zakāt on al-‘ayn was generally being paid by the people themselves directly to the beneficiaries without any intermediation of the government. Therefore, it is difficult to discern which of these views, if any, was actually put into operation by people during that time.

Apart from al-‘ayn, in order to apply the principle of hawl, the same questions arose in respect to the additions to the merchandise of a trader during the hawl itself. In this regard some fatawā of the Successor jurists are related in our sources.<sup>2</sup> However, these fatawā only confirm that zakāt would be levied on the merchandise every year and that once a merchant had paid the zakāt on his total merchandise, it could not be

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1. Amw., 417.

2. San., IV, 78-80 and 95-8; Amw., 416-7.

charged again until the same month of the next year.<sup>1</sup> Therefore it can be inferred that during the period under discussion the implementation of the condition of the hawl in the case of the merchandise implies that all the additions to the property during the year would be assimilated into the remainder of the previous year and zakāt would be levied annually on the entire possessions of the trader, irrespective of the earnings or additions during the year. The same practice was reported to be continued in the time of 'Umar b. 'Abd al-'Azīz.<sup>2</sup>

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Besides the application of the condition of hawl with regard to the merchandise of a trader, the zakāt levy on the merchandise itself can also be assumed as an ijtihādic development of the zakāt law which probably took place during the Successors' time. Zakāt on al-'ayn (silver, gold and coins) was levied during the Prophet's time. However, the assumption that merchandise was equal to al-'ayn and that it was subject to a zakāt levy of the same annual rate as al-'ayn seems to be a later innovation. This assertion is supported by the fact that Malik, under the heading of zakāt on al-'urūd (merchandise) mentions first a letter of 'Umar b. 'Abd al-'Azīz written to Zurayq b. Ḥayyan (d. 105 A.H.), a zakāt collector in Egypt.

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1. Ibid.

2. San., IV, 80; Amw., 416-7.

According to the letter, Zurayq was instructed to check those Muslim traders who passed through his territory and levy zakāt on their merchandise that had been in regular transaction during the year at the rate of 2½%, provided the total property did not amount to less than the minimum zakātable limit. The lesser amount, even one third of a dīnār, must not be levied at all.<sup>1</sup> He was also instructed to issue a receipt to the trader for his zakāt valid up to the following year.<sup>2</sup>

The practice which is generally employed by Mālik in his Muwatta' is that under each juristic topic he first mentions the relevant report from the Prophet, if available through what he regards as a reliable chain of transmitters, then the opinion and practices of the Companions and then the discussions of the Successor jurists. Therefore it appears that 'Umar's decision of levying zakāt might be a result of either his own ijtihād or the ijtihād of other contemporary jurists of the Successors' time, for Malik did not mention any earlier precedent in this regard. As far as other contemporary jurists are concerned, San'ānī related numerous reports from Nakha'ī (d. 95 A.H.), Sha'bī (d. 103 A.H.), Hammād (d. 120 A.H.), Sa'īd b. al-Musayyib (d. 95 A.H.), 'Urwa b. al-Zubayr (d. 94 A.H.), Qāsim b. Muḥammad (d. 108 A.H.), 'Aṭā' (d. 114 A.H.), 'Amr b. Dīnār (d. 122 A.H.), and Tā'ūs (d. 106 A.H.), who all held the view that zakāt must be levied annually on the merchandise as well.<sup>3</sup> It appears

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1. Muw.Y. I, 194.

2. Ibid.

3. San., IV, 95-7.

that levying zakāt on merchandise was perhaps an agreed decision among the jurists of the Successors' time, as no difference of opinion from them is reported.

It is rather surprising that no prophetic utterance or action in respect of zakāt levy on merchandise can be traced in the available compilations of jurisprudence and traditions before Abū Dā'ūd Sijistānī (d. 275 A.H.). Although it is reported that when Hammās al-Laythī replied to 'Umar b. al-Khaṭṭāb, on being asked to pay zakāt: "I have no property in zakātable amount except ji'āb (quivers) and udum (skins) he said then "fa qawwimhu wa addi zakātahu" (Estimate its value and pay its zakāt).<sup>1</sup> Abū 'Ubayd, mentioning the above action of 'Umar b. al-Khaṭṭāb also added the fatwā of Ibn 'Umar and Ibn 'Abbas in favour of zakāt on merchandise.<sup>2</sup> But according to the available information Abū Dā'ūd is the first person who mentioned a report of Sumra b. Jundub (d. 58 A.H.) through a chain of transmitters, i.e., Sulaymān b. Mūsā — Ja'far b. Sa'd — Khabīb b. Sulaymān, — Sulaymān — Sumra b. Jundub, that the Prophet had been ordering <sup>them</sup> to pay zakāt on what ~~they~~ were intending to sell.<sup>3</sup> The above chain of transmitters has been criticised by some scholars and confirmed by some others.<sup>4</sup> Nevertheless it seems clear that at the time under discussion this hadīth was not known among the Successor jurists ,

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1. San., IV, 96; Mus.Sh., IV, 43; Amw., 425.

2. Amw., 425-6.

3. A. Dā'ūd, II, 95.

4. See Ibn Ḥazm, al-Muhalla (Beirut, n.d.) vol.V, 234.



for if it was, it would hardly have been neglected by the early compilers.<sup>1</sup> Hence all the discussions of the Successors' time relating to zakāt seem to have been based primarily on ijtihād. However, this particular ijtihādic process seems to have been brought about in a spirit of agreement rather than controversy and divergence. Probably the reason for this agreement was the fact that zakāt on merchandise itself is a concept which can be inferred from those Qur'ānic statements in which the Muslims are instructed to pay zakāt from their amwāl in general or from the verses where a general instruction is given as "anfiqū min tayyibāt mā kasabtum wa akhrajnā lakum min al-ard" (make contributions out of the best of whatever you earn and what we have provided you from the earth).<sup>2</sup>

Moreover, its total exclusion from the domain of zakāt was itself contradictory to the real purpose and wisdom laid down behind the whole system of zakāt. This is the reason why we find several Qur'ānic commentators of the Successors' time, who while they interpret the above verse of "anfiqū min tayyibāt mā kasabtum", specifically mention that the words mā kasabtum also imply merchandise. Tabarī narrates this interpretation through

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1. This is further supported by the fact that the Jurists of the Successors' time, though <sup>they</sup> declared their fatawā in favour of zakāt on merchandise, and their fatawā are subsequently mentioned in the early sources, however, none of them contain any utterance of the Prophet in the case.
  2. Q. 2:267.

different channels from Mujāhid (d. 103 A.H.), an eminent Qur'ānic commentator of the Successors' time.<sup>1</sup> According to Jaṣṣās, the same interpretation is reported by a group of salaf (predecessors) including Mujāhid and Ḥasan al-Baṣrī (d. 110 A.H.)<sup>2</sup>

As to the agreement on the principle of levying zakāt on merchandise, no difference of opinion is reported over the question of its minimum zakātable amount and its rate among the Successor Jurists, and it appears from the above quoted letter of 'Umar b. 'Abd al-'Azīz that the same minimum zakātable amount and rate, which was originally fixed for al-'ayn during the Prophet's time, was now enacted for merchandise.<sup>3</sup> The difference of some Zāhirīs or Imāmītes in this regard is a matter of much later development.<sup>4</sup>

The above agreement of the Successor jurists indicates that, since very early times after the Prophet's death, though a tendency of literalism and strict literal following of the Prophet's statements may have existed, it did not prevent a comparatively strong trend which gave more emphasis to the spirit and purpose of the prophetic utterances rather than strict adherence to the words. However, literalism had not yet reached its zenith. This was to happen in the post-Shāfi'ī period - which ultimately gave birth to the Zāhirī school of thought and

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1. Al-Ṭabarī, Jāmi' al-Bayān (Cairo 1388/1968), vol.III, pp.80-1. Cf. Mujāhid (d. 104 A.H.) Tafsīr, ed. al-Sūrī (Beirut, n.d.) vol.I, p.117.
  2. Jaṣṣās, Ahkām al-Qur'ān (Cairo, 1347 A.H.), vol.I, 543.
  3. Supra, p.57.
  4. Ibn Ḥazm, op. cit., loc. cit.

accordingly nothing could be argued or accepted without a reliable report about its direct relation to the Prophet's statements or his precedents. If this trend had been as strong in the Successors' time, it would not have been possible for them to reach an agreement over the problem of zakāt on merchandise without any direct Prophetic utterance in the case.

Apart from the agreement of obligatory zakāt on merchandise and the determination of minimum zakātable amount and rate, some minor differences could be traced in respect of the derivative details among the Successor jurists. For instance, there was the problem of whether when a trader possessed some ware for sale and had already paid zakāt on it, and if the goods remained unsold for a number of years, how would the law be applied to this: would the trader have to pay zakāt annually or would the primary payment be regarded as enough till the ware came into regular transaction? Ibrāhīm Nakha'ī, Sa'īd b. Musayyib, 'Urwa b. al-Zubayr and Qāsim b. Muḥammad inclined to levy zakāt annually,<sup>1</sup> while Sha'bī 'Amr b. Dīnār, 'Aṭā' and Tā'ūs declared that in the above case zakāt could be levied in that year only in which the goods ~~had~~ been actually involved in the sale/purchase transaction.<sup>2</sup> As we have already indicated above the second mentioned view might have been affected by the evolving theory of that time regarding the productivity of wealth as a primary condition for requiring zakāt to be paid

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1. San., IV, 95-8.

2. Ibid.

on any property.<sup>1</sup>

Another ijtihādīc discussion which appears to have originated in the time of the Successor jurists, was the problem of zakāt on mineral production. As mentioned before, the Prophet had already fixed khums (20%) on al-rikāz (buried treasures)<sup>2</sup> and this prophetic enactment seems to be well known among the circles of both Hijāz and Iraq. However, a difference arose on the question of whether mines should or should not be included in al-rikāz. Ibrāhīm Nakha'ī included it in al-rikāz and declared a 20% rate on the mineral production as well.<sup>3</sup> This view in later times was not only followed by Abū Ḥanīfa (d. 150 A.H.) and the other jurists of Kūfa in general, but they also held the view that the meaning of al-rikāz applied mainly to the mines and only implicitly to treasures buried by man in the past.<sup>4</sup> This assertion is based on the fact that al-Shaybānī, in his version of Muwatta' after quoting the famous report of the Prophet "fī al-rikāz al-khums", also added that the Prophet on being asked what al-rikāz was, had also explained that it was the wealth in the earth created by God at the time of creation of the skies and the earth. After mentioning this, al-Shaybānī goes on to say that the same view was adopted by Abū Ḥanīfa and what he calls 'āmmat fuqahā'nā', our general (group) of our jurists, by which he probably meant the jurists of his region.<sup>5</sup>

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1. Supra, p. 188.

2. Supra, ch. I, p. 57.

3. Ath.Y., 88-9.

4. Muw.Sh., 119.

5. Ibid.

However, apart from the above-mentioned view of Ibrāhīm Nakha'ī, another new development in this regard appears to have taken place during the time of 'Umar b. 'Abd al-'Azīz. Ṣan'ānī, through Ma'mar b. Rāshid (d. 153 A.H.) related a report from a person who himself had worked during 'Umar b. 'Abd al-'Azīz's time in the mines. According to his report, during that time the mineral wealth that was extracted and processed by their physical labour was subject to a rate of 5 dirham per 200 dirham, that is, only 2½%. However, if any rikāza was extracted from the mine then it was subject to the rate of khums (20%).<sup>1</sup> It appears that the word rikāza in the report probably meant the mined resource which did not need a further process of hand work.

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Apart from the above, another ijtihādic development of the Successors' time can be seen in the case of zakāt on mustakhrajāt al-baḥr (extractions from sea), because two different rates of 20% and 2½% were being enacted according to reports for the two different items namely 'anbar (ambergris) and fish. As far as the case of the former is concerned we have already mentioned in the second chapter that a decision of levying khums on it had already been made during the time of 'Umar b. al-Khaṭṭāb.<sup>2</sup> The same decision later on appears to have been followed by

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1. San., IV, 116.

2. Supra, ch. II, p. 115.

'Umar b. 'Abd al-'Azīz.<sup>1</sup> The details of the action taken by 'Umar b. 'Abd al-'Azīz in this regard are related in a report of Ibn Jurayj (d. 150 A.H.) that on being asked in a letter from 'Urwa b. Muḥammad al-Sa'dī about the case of 'anbar (ambergris), 'Umar b. 'Abd al-'Azīz sent a reply instructing him to investigate the early precedents in the case and to inform him about them. 'Urwa, in reply, wrote adding his own suggestion that 'anbar (ambergris) should be considered as similar to ghanīma (booty). According to the report 'Umar b. 'Abd al-'Azīz then finally decided to levy khums (20% rate) on 'anbar as well.<sup>2</sup> The contents of the above report are also confirmed by the two other reports of Ma'mar b. Rāshid (d. 153 A.H.) and al-Thawrī (d. 150 A.H.)<sup>3</sup> Similarly, Ḥasan al-Baṣrī (d. 110 A.H.) and al-Zuhrī (d. 124 A.H.), two other Successor jurists, also are reported to have held the same view.<sup>4</sup> However, it is difficult to say whether the above rate of khums (20%) was enacted under the head of zakāt collection, that was subject to specified Qur'ānic heads of spending or <sup>wether</sup> instead it was regarded under the head of khums al-ghanīma, that was subject to the general expenditure of the government.

As regards the time earlier than the Successors, two contradictory reports in the case are related from Ibn 'Abbās.

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1. San., IV, 64.

2. Ibid.

3. Ibid.

4. Amw., 346.

According to one report his view is mentioned as "lā narā fī al-ʿanbar khums liʾannahū shay ʿasarahū al-bahr"<sup>1</sup> (we do not regard ambergris as subject to khums (20% rate), for it is a thing that is thrown out by the sea itself). While the other reports suggest that on being asked by Ibrāhīm b. Saʿd, the governor of ʿAdan at that time,<sup>2</sup> Ibn ʿAbbās replied that if anything is to be levied on ambergris it can only be khums.<sup>3</sup> It is most likely that Ibn ʿAbbās first held the view that nothing should be levied on ambergris, possibly considering its meagre extraction, but later on, in response to an enquiry from the governor of ʿAdan, where it might have been in abundance, as it was on the sea shore, he changed his view and inclined to levy khums on it.

With regard to the second item of sea produce, i.e., fish, it is reported that ʿUmar b. ʿAbd al-ʿAzīz wrote a letter concerning this to the zakāt executive of ʿAmmān. In his letter, he instructed that nothing should be levied on fish except when the total value of its catch reached the equivalent of, or more than, the minimum zakātable amount of 200 dirham. In that case only a rate of 2½% may be levied.<sup>4</sup>

If the introduction of these two different rates in the case of two different items is compared with the practice of two different rates on the mineral production, it would appear to indicate the operation of a general or rudimentary qiyās

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1. San., IV, 65; Mus.Sh., IV, 21.
  2. Al-Zaylʿī, op. cit., II, 383.
  3. San., IV, 64; Mus.Sh., IV, 21.
  4. Amw., 447.



was wider in scope than the limited and logical qiyās developed by the later jurists as the fourth foundation and a major source for Islamic fiqh.

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Two other ijtihādīc developments which took place particularly in the time of 'Umar b. 'Abd al-'Azīz, can also be identified from our sources. The first is the exemption of horses and honey from zakāt. Mālik related a letter of 'Umar b. 'Abd al-'Azīz, that was written to Abū Bakr b. 'Amr b. al-Ḥazm (d. 120 A.H.) in Minā. According to the letter he was instructed not to take any zakāt on horses and honey.<sup>1</sup> As regards horses, it has already been explained how this animal, during the Prophet's time, had been totally exempt from zakāt, but later on, a specific rate on it was levied for the first time during the period of 'Umar b. al-Khaṭṭab<sup>2</sup> and continued to be practised afterwards until the time of 'Umar b. 'Abd al-'Azīz. This practice may, however, have been discontinued but only briefly in the days of 'Alī, when he in the jurisdiction of his domain had again exempted horses from zakāt.<sup>3</sup> After him the practice of levying zakāt on horses had been continued by the Umayyad rulers. Yet, as a result of 'Alī's action in this regard, the problem had remained as a

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1. Muw.Y., I, 206.

2. Supra, pp. 109-13.

3. Supra, pp. 154-56.

matter of dispute among the younger Companions<sup>1</sup> and their Successors.<sup>2</sup> And, now, during the time of 'Umar b. 'Abd al-'Azīz, the horse was once again being excluded from zakāt. The reason behind that seems to have been simply to follow the exact practice of the Prophet's time and to adhere strictly to his clear statement regarding the exemption of horses. However, the exemption of zakāt on honey seems surprising, because a 10% rated zakāt had also been reportedly levied on honey by the Prophet.<sup>3</sup> Kitāb al-āthār and Muwatṭa' do not elaborate on this matter. However, San'ānī related some reports which throw some light on the situation at that time. Al-Thawrī reported from Nāfi' (d. 120 A.H.) through 'Ubayd Allah b. 'Umar (d. 147 A.H.) that when he was deputed to Yemen as a zakāt collector by 'Umar b. 'Abd al-'Azīz, he intended to take zakāt on honey, but Mughīra b. al-Ḥakīm (a jurist of Yemen) said that no zakāt could be levied on honey. He wrote to 'Umar b. 'Abd al-'Azīz about this, who then replied that Mughīra was truthful, honest and an acceptable man.<sup>4</sup> This report is illustrated by another report that Nāfi', on being questioned about the legality of zakāt on honey by 'Umar, replied that honey was not generally found in Hijāz, but he had enquired from Mughīra b. al-Ḥakīm, who had said that no zakāt was levied on honey. Then 'Umar said that

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2. For the opinions of the Successor jurists such as Sa'īd b. al-Musayyib, Sha'bī, Hasan and Nakha'ī, see Mus. Sh., IV, 36-7.

3. Supra, ch. I, p. 56.

4. San., IV, 60-1. Mus. Sh., IV, 21.

Mughīra was a fair, unaccused and truthful person.<sup>1</sup> The last part of both reports show that 'Umar considered the opinion of Mughīra as a reliable report especially keeping in view the fact that honey was generally found in Yemen and not in Ḥijāz. Further, in another report, through Ṣālih b. Dīnār, Ṣan'ānī mentions 'Umar b. 'Abd al-'Azīz having written a letter to 'Uthmān b. Muḥammad, forbidding him to take zakāt on honey except in case the Prophet himself had done so. 'Uthmān in response called the ahl al-'asl (bee-keepers) to enquire from them about the Prophet's practice in this regard. They confirmed that once Hilāl b. Sa'īd brought honey to the Prophet, who asked what it ~~was~~? Hilāl replied that it ~~was~~ a gift. The Prophet accepted it. Sometime later he again took honey to the Prophet and when the Prophet asked him what it was, he replied that it was sadaqa. The Prophet ordered it to be distributed. The Prophet did not mention, however, any rate of zakāt at that time. 'Uthman wrote this to 'Umar b. 'Abd al-'Azīz and stated: "You know better that we have been accepting what the people themselves offered us. We have never demanded from them any 'Ushr (10%) or nisf 'ushr (5%) in this regard".<sup>2</sup>

If these reports are compared with the primary reports of Muwatta', it appears clear that the Prophet at the beginning probably did not deem it necessary to fix any rate of zakāt on honey, for it was not generally produced in the surrounding

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1. San., IV, 60-1.

2. San., IV, 61.

localities of Ḥijāz. However, it is possible that the Prophet later on actually would have fixed a rate of 10% on it, in response to queries from other localities like Yemen, etc., where honey was plentifully produced. However, this might not have been in the knowledge of general Companions of Ḥijāz, and the jurists in the time of 'Umar b. 'Abd al-'Azīz might also have been generally unaware of this report. The first possibility is supported by a report from Mu'ādh b. Jabal (d. 18 A.H.), when the people asked him about the zakāt on honey, he said: "I have no order of the Prophet in this regard".<sup>1</sup> The second possibility can be argued by the two reports from two different channels: (i) Ṣan'ānī — 'Abd Allāh b. Muḥarrir — Zuhri — Abū Salma — Abū Hurayra (d. 67 A.H.)<sup>2</sup> (ii) Ṣan'ānī — Sa'id b. 'Abd al-'Azīz — Sulaymān b. Mūsā and Abū Sayyāra al-Muta'ī, that the Prophet had fixed 10% zakāt on honey.<sup>3</sup> Both of these channels are criticised by Bukhārī and Tirmidhī.<sup>4</sup>

Here our objective is neither a criticism or examination of the chains of the transmitters nor do we want to prove which of these two reports is correct. The aim of the above discussion has been to explain the extent of the influence of the presence or absence of the Prophet's statements. We have also tried to illustrate how far the evolving trend of

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1. San., IV, 60.

2. San. IV, 63.

3. Ibid. Cf. Mus.Sh., IV, 20 and Tay., 169.

4. San., IV, 63; footnotes 3 and 4.

unacceptability of anything which is not related to the precedents of the Prophet's time was actually affecting the ijtihādīc attempts of that time. One reason why this trend was so strong in 'Umar b. 'Abd al-'Azīz's time might have been the fact that 'Umar stood as an upholder of the revival of the prophetic ḡunna and believed that its proper following had been interrupted at least in the socio/political sphere during the period immediately before him. Therefore, it would not be surprising if a feeling of revival had been a cause of intensification of the trend, whereby anything which had no direct relation with prophetic practice was regarded non-authoritative and therefore unacceptable. Probably it was the same feeling that compelled 'Umar b. 'Abd al-'Azīz to order a compilation of ḡunna for he is reported to have written to Zuhri in Syria, 'Amr b. Ḥazm in Medina, and 'Abd Allāh b. 'Amr b. al-'Āṣ in Egypt, asking them to trace and compile the prophetic statements and practices and the precedents of his Companions.<sup>1</sup>

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Another ijtihādīc development of the particular time of 'Umar b. 'Abd al-'Azīz, was the one pertaining to al-māl al-dimār (the property which had become out of the control of the owner). 'Umar had ordered the return of such properties

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1. I. Sa'd, II, 387; al-Dārmī, Sunan, (Damascus, 1349), vol.I, p.126. Cf. al-'Asqalani, Fath al-Barī (Cairo, n.d.) vol.I, p.204.

which had been illegally taken by the amīrs and the influential persons, to their owners. The problem arose as to whether zakāt would be levied on such property for only one year or for the entire period for which the property had not been in the hands of the original owners, in spite of belonging to them legally.

According to al-Muwatta', when 'Umar b. 'Abd al-'Azīz first ordered the return of such property to its legal owners, he also issued an instruction to deduct zakāt for the previous years.<sup>1</sup> However, some time afterwards (perhaps after deliberation and consultation) he annulled the previous instruction and, instead, ordered that zakāt be levied for only one year on such property since it was dimār.<sup>2</sup> This ijtihād of 'Umar b. 'Abd al-'Azīz later on seems to have affected the view of Mālik and his contemporaries in the case of the debts recovered by the owner after several years, as they exempted such debts from the zakāt in respect of the previous years.<sup>3</sup>

This theory of dimār illustrates on the one hand the balance between the application of law, public benefit (maṣlaḥa) and justice, while, on the other hand, it also indicates that the prevalent theory of the Successors' time, which implied the condition of productivity of wealth for the obligation of the payment of zakāt on any property, may perhaps have been at work.

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1. Muw.Y., I, 193; San., IV, 103-4; Mus.Sh., IV, 53.

2. Ibid.

3. Muw.Y., I, 193.

After having propounded a detailed picture of the ijtihādic development in the sphere of zakāt law, covering the period under discussion as a whole and after having studied in this regard the particular time of 'Umar b. 'Abd al-'Azīz, we now turn to the results of our study in this chapter. From the above study we can positively deduce the following conclusions.

- (1) Similar to the preceding time, the major and real field for the ijtihādic legislative activities was still the private and the individual circles of religious scholars. Although the wide gulf between the government and the scholars which, due to several factors, had emerged during the preceding time, was now becoming gradually narrower, yet there is no sufficient reason to conclude that during this time the ijtihādic process had regained the effective involvement of the government or the central leadership of the caliph as a religious authority. Instead, during this time as well, the ijtihādic and legislative activities in general appear to be completely free from any effective participation of the government and the process of ijtihād as a whole was continued only through private efforts even without any association with the central authorities. An exception in this regard is the brief period of 'Umar b. 'Abd al-'Azīz when most of the practical powers were actually transferred to the religious scholars or the jurists themselves. Only during this last part of the period under discussion, can sufficient evidence for the involvement of the government



and the leadership of the ruler as a religious authority be deduced from the sources.

- (2) As compared to the preceding period of the younger Companions, it appears that during the period of their successors ijtihādic activities in general not only flourished but also became more advanced and disciplined. In the preceding time the process of ijtihād appeared to be shrinking and ceasing,<sup>1</sup> while during the period under discussion the process of ijtihād appeared to be expanding and flourishing. Nevertheless, the major factor in this regard was, perhaps, the improved political situation and more peaceful atmosphere of the time. This was not only more conducive to the juristic activities in general but also provided a greater opportunity for the mutual co-operation between the different regions. This is the reason that the jurists of the period under discussion were not only trying to solve newly emerging problems but were also attempting to reconcile some old controversial issues of the preceding time. This is demonstrated by the views which were being presented by the Successor jurists. For example, in the case of zakāt on orphans' property, the view that his property which comes under the category of al-amwāl al-zāhira would be subject to zakāt while al-amwāl al-bātina would be regarded as exempted till the

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1. Supra, ch.III, p. 177.

time of the majority of the orphan, represents a moderate instance between the extreme contradictory viewpoints of 'Irāqī and Hījāzī jurists on this problem. Likewise in the case of zakāt on gold and silver jewellery, the view that jewellery in constant use by the owner would be regarded as the domestic wares and hence would be exempted from zakāt while the other jewellery which had been kept by the owner as a form of saving and wealth would be considered as subject to annual zakāt, also reflects an attempt to reconcile the two extreme opinions of the jurists in this regard.

- (3) A specific ijtihādic development of the period under discussion that can be determined in the light of the above study was a strong trend towards evolving and formulising the general principles and some technical legal theories first and then applying them in the derivative details of the law. For example, we find several technical theories prevalent among the Successor jurists such as the categorisation of the properties into two kinds, al-amwāl al-zāhira and al-amwāl al-bāṭina, for the purpose of zakāt payment to the government. Likewise, the doctrine that productivity of wealth is a basic condition for the obligation of the payment of zakāt on any specific property and the principle that an ḥawl (zakāt cycle) must have been passed over the possessions for the annual zakāt levy, clearly reflect the above trend. This trend was refining and

systematising the law as it expanded and hence making the law more uniform and balanced in respect of all its details and derivatives. However, the application of some general theories and principles in the derivative details may have been responsible for some of the technical complexities which we have seen in the application of the principle of hawl in the case of different incomes during the year. We have already explained how the jurists of the time were trying to solve these complexities. Indeed, there seems to be sufficient grounds to assume that the above trend would have eventually directed the jurists to form or evolve the technical legal thought (Usul al-Fiqh) for the whole structure of Islamic law and jurisprudence. Consequently the jurists during the first half of the second century can be found moving on the same lines and hence the science of Usul al-Fiqh gradually evolved and later on was shaped into an independent and separate part of Islamic legal sciences.

- (4) The above-mentioned general principles and technical theories of the zakāt law, in their evolution and formation, positively confirm that the general instruction of the Qur'ān and the practical laws of the Prophet's time had been given the status of basic and major source for the zakāt law in general. On the other hand, it cannot be denied that the practices and the precedents of the early time (including both of the periods of older and younger Companions) were not only given a significant importance,

but sometimes had also been regarded as a basic and fundamental source of the law. For example, the principle of hawl appears to have emerged from such precedents. Nevertheless, the process of legal criticism and analysis was gradually strengthening a trend among the jurists that only those precedents that belonged to the Prophet's time ought to be regarded as final and authoritative - hence in the case of contradiction between the early precedents of the Companions time, the later development was being considered as subject to invalidation. Specifically the above trend was acquiring strength from the mood of resurgence of the Prophetic sunna, that appears to be prevalent during the time of 'Umar b. 'Abd al-'Azīz. The total exemption of horses and honey from zakāt provides positive evidence in this regard.

- (5) In general, the ijtihādīc development of the period under discussion pertaining to zakāt law as a whole illustrates the use of qiyās (though in its rudimentary form), the observation of public benefit, and the consideration of the general principle of justice in the process of legal interpretation, application and deduction from the specific sources. This can be inferred from the several examples, such as the consideration of labour in the enactment of two different rates for mineral production. Likewise on the same grounds only the 2½% rate was charged for fish, while the former rate on ambergris, a sea product, was 20%. Similarly, the decision that al-māl al-dimār was

to be exempted from zakāt in respect of the previous year  
and would be subject to zakāt only in respect of the  
current year, confirm positively the above inference.

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## CHAPTER 5.

### Conclusions of the Study.

This last brief chapter is aimed at comprehending the achievements and results of all that discussion, which is spread over the preceding four chapters. These conclusions have already been pointed to at the end of every chapter. Here, for the sake of convenience, the salient points are re-capitulated.

#### (1)

The Concept of obligatory help for the poor, orphans and deprived had been put forward in those Qur'ānic verses which were presented by the Prophet in the very early days of his prophethood in Mecca as revealed words of God. Under this obligation, not only was it a responsibility of well-to-do people to help the needy and deprived, but urging one another to do so was also a religious obligation. Furthermore, this was presented as a right for the poor to share in the wealth of well-to-do people - a right that must be paid and demanded.

#### (2)

Fear of God and the concept of individual responsibility before God in the hereafter, which was repeatedly stressed by the Qur'ān, was presented as the basic motive and as the ultimate sanction for compliance of the above obligation.

#### (3)

The terms zakāt and ītā' al-zakāt were also current for this kind of spending at the time close to the emigration to Abyssinia. However, another term infāq fī sabīl Allah was also in use for the purpose in the same Meccan Period of the Prophet. We can only trace the use of the word sadaqa for this purpose, in one place - in a Qur'ānic sūra revealed very late in the Meccan Period of the Prophet. Therefore, the use of the term sadaqa probably became current in Medina.

(4)

The heads on which the zakāt was to be spent, had already been mentioned in the Meccan Qurānic verses. However, there is no evidence to prove whether or not any system of collection and distribution was adopted in that early stage. The rates and the fixed exemption limits certainly did not exist in that period. It is possible, however, that the believers of the Meccan period would have been spending a part of their wealth privately on the heads already identified by the Qur'ān.

(5)

In Medina, where the Prophet and his followers had freedom to act, the adoption of the system of collection and distribution, in order to implement collectively the Qurānic instructions in this regard can be demonstrated. However, the introduction of the system of fixed rates and exemption limits seems a later development, probably in the last few years of the Prophet's lifetime, perhaps after the victory over Mecca (in 8 A.H.) or at least after Hūdaybiya Pact (in 6 A.H.). Before the introduction of rates the believers had been persuaded to spend more and more for zakāt, ṣadaqāt and infāq fī sabīl Allah without any specific rate or any definite regulations. These items were also a major source of support for the settlement of Meccan immigrants and for the military campaigns during that period.

(6)

In the later years of the Prophet's life in Medina, a system of collection and distribution was established with definite zakāt rates, exemption limits and other regulation in this regard. Zakāt Collectors were also appointed for this purpose in the capital of Medina and for other tribes.



(7)

Apart from fixing heads for the expenditure of the zakāt fund, the Qur'ān, which was presented by the Prophet as the word of God, inclined towards establishing general rules and giving only the instructions of a constitutional nature in this regard, without indulging in much detail. Therefore, the detailed zakāt laws of the Prophet which were actually enforced during the later time of his life, had, in fact, two distinctive parts.

(i) The fixed heads of zakāt expenditure, general rules and instructions pertaining to zakāt and the basic constitutional skeleton for it, all of which was provided by the Qur'ān.

(ii) The details and practical regulations, which were shaped, evolved and enforced within the limits provided by the Qur'ān.

(8)

A major and effective role of ijtihādic activity in shaping and developing the second part, cannot be completely denied. Although a small group of Muslim scholars, in the third and later centuries, reject the idea of the Prophet's ijtihād, they do not have strong reasons or sufficient arguments to back their stand. In fact, a substantial majority of jurists accept the idea of the Prophet's ijtihād. Our arguments and observations in the <sup>first</sup> chapter confirm this notion.

(9)

The following items constituted the major and fundamental sources for the above mentioned ijtihād of the Prophet.

(a) Qur'ānic general rules and constitutional

instructions relating to zakāt (including the fixing of the heads for zakāt expenditure).

(b) The wisdom and opinion of the Prophet.

However, it can easily be seen that the (a) held a coercive and superior position over the (b). Apart from these two major sources, the following should be considered as the secondary or minor sources for the Prophet's ijtihādīc activity.

(i) Consultation with the Companions.

(ii) The old or current traditions, customs and behaviour of Arab.

(iii) Influence of selective adoptions from Ahl al-Kitāb, living in the surroundings of Medina.

(10)

Our study of the detailed zakāt laws in the first chapter leads us to the idea that the following methods, modes and ways would have been adopted in the ijtihādīc activity of the Prophet pertaining to zakāt.

(i) Interpretation - of the relevant Qur'ānic texts.

(ii) Application and formation of applicative details - for the purpose of applying the above mentioned texts.

(iii) Deduction and derivation - from the general rules in the texts.

(iv) New legislation and formulation of regulations - within the limits provided by the Qur'ān.

(v) Selective adoption - from the secondary and minor sources.

(11)

Our study also shows that the following general principles might have been adopted or adhered to, in the process of the above mentioned ijtihādic/legislative activity pertaining to zakāt laws during the Prophet's time.

- (i) The superiority of the Qur'ān.
- (ii) The emphasis on the aims of legislation rather than its internal/literal contents.
- (iii) The principle of "gradual legislation".
- (iv) The principle of Realism. - Legislation was meant to deal directly with the actual events. Pre-supposition and speculation on the basis of hypothetical issues were excluded from the philosophy of ijtihād/legislation.
- (v) The principle of natural justice and equity.
- (vi) The consideration of individual and public benefit.
- (vii) The maintenance of a balance within the branches and derivative details of the laws.
- (viii) The elimination of hardship.
- (ix) The main emphasis on the ethical/moral aspect of law and the adoption of the idea of the individual responsibility before God as the motive and ultimate sanction for compliance with obligations.

(12)

After the death of the Prophet, the Companions continued to develop the institution of zakāt on the same lines that were fixed during the Prophet's time. However, in the early days of Abū Bakr's time, they had to deal with a temporary

challenge against the effective control of the government over the institution of zakāt or at least against the supremacy of the Capital, Medina, in this regard. The main cause of this new situation, as our study in the second chapter confirms, was the doubtful future of Medinan government in the eyes of some Arab tribes. When this situation was quickly brought under control, the challenge was also successfully dealt with. Thus not only was the institution of zakāt saved from collapsing but it was developed through some ijtihādīc improvements. Our study in the second chapter leads us to conclude that following ijtihādīc decisions had been carried out during the time of the older Companions, i.e. from 10 A.H. to 35 A.H..

- (i) The decision to use military force against those Muslim tribes who had refused to hand over their collections of zakāt to the centre.
- (ii) Abū Bakr's practice of never charging zakāt on a property before the end of one year of its ownership.
- (iii) The inclusion of horses among the zakātable livestock.
- (iv) The addition of pulse, seeds, lentils and olives in the zakātable categories of al-Harth (agricultural produce).
- (v) 'Umar's instruction to charge Khums (20%) on 'anbar (ambergris) and on other valuable objects, thrown out by the sea itself.
- (vi) The introduction of two different rates in the case of money collected in mountains and that obtained in the plains - the first was charged under the rate of niṣf 'Ushr (5%) while the second was subject to the rate of 'Ushr (10%).

- (vii) Levying zakāt on merchandise - the approximate total value of merchandise was taken as the basis for assessment of obligatory zakāt. 'Āshirīn (tax collectors) were also appointed for this purpose on important trading routes. They were instructed to charge jizya (secular tax) from non-Muslim and zakāt from Muslim traders.
- (viii) The enactment of a legal punishment for evaders of zakāt. - A fifth portion of the total property of an evader could be seized.
- (ix) A general policy of giving maximum possible relaxations and flexibility in the application of law, such as; (a) Exclusion of well-bred animals (that were al-rubā, al-mākhiḍ, al-fahl and al-akūla) from being charged as zakāt of livestock. A general instruction was given to the collectors that before selecting zakāt animals from livestock, the owner must be given an open option to exclude his best animals to a limit of one third of his total livestock. Then from the remaining two thirds, an animal of average quality should be chosen as zakāt animal. (b) Postponement of zakāt collection for one year on the eve of al-ramāda (year of drought). (c) 'Umar's order to invest the properties of orphans in some paying concern, otherwise it would be reduced by the annual levy of zakāt. (This seems to have been effective in Ḥijāz). The same consideration of orphans' benefit led 'Abd Allah b. Mas'ūd, the zakāt executive of 'Umar's time in Kufa, to

exempt orphans' property until he came of age.

(x) The ijtihādīc decision of Uthmān's time to resolve the legal complexities relating to loans and debts in the compliance of zakāt law.

(13)

Our analysis of whole ijtihādīc activity of the period of Older Companions, carried out in the second chapter, shows the following sources of ijtihād in that period.

- (i) The Qur'ān.
- (ii) The laws of the Prophet's time, practices and precedents.
- (iii) Mutual consultation (shūrā).
- (iv) Individual reasoning and judgement (ra'y).
- (v) External influence or Islamicisation.

The first two were the only totally independent sources of ijtihād carrying with them binding force over others. As the second source, i.e. the laws of the Prophet's time, practices and precedents had not yet been completely and systematically collected, therefore, in spite of the Qur'ān, in the process of inference from this second source, a strong inclination towards paying greater attention to the aims and objectives of the laws rather than the literal words of the Prophet appears to be prevalent during the time of Older Companions. However, in this regard, the presence of a cautious trend of reluctance and hesitation at that time cannot be entirely excluded. The third and fourth sources, namely mutual Consultation (shūrā) and individual reasoning and judgement (ra'y) can be considered as the main and major sources of ijtihād (though of subjective nature before the first two) in that period. The last mentioned source, "External influence and Islamicisation" can only be regarded as a

source of minor and secondary nature for the above purpose.

(14)

As far as the methods of inference are concerned, the same five methods which had already been introduced during the Prophet's time were generally used during the time of older Companions as well. However, an extensive development of the above methods during the time of older Companions can be concluded from our study. For example, in the process of interpretation and deduction, in addition<sup>to</sup> the Qur'ānic texts, the laws of the Prophet, his practices and precedents, and his relevant legal utterances were now being brought into the main focus and becoming a major source for the process of deduction. A rudimentary form of qiyās (analogy) was also being used. Moreover, the new legislation of the Companions' time as compared to the legislation of the Prophet's time appears to have been considered from the very beginning as relatively more <sup>liable</sup> to be amended and repealed. Furthermore, it can also be concluded that during the time of older Companions, the notion of maṣlaḥa (public benefit) and the principle of raf' al-ḥaraj (avoiding of hardship) attained a more prominent position.

(15)

Another noticeable development of the period of <sup>the</sup> older Companions is a change in the motivating force and in the sanction for compliance of law in the society. Although the doctrine of individual responsibility before God and the belief in punishment and reward of the hereafter was still providing a motive and an ultimate sanction in this regard, the power of an organised government, through its punitive measures, was also playing a central role in the enforcement of the law in general.



This is evident from the decision to wage war against those tribes who had refused to hand over their zakāt collections to the central government during Abū Bakr's time and from the enforcement of a specific legal penalty for those who evaded the payment of zakāt during the time of 'Umar.

(16)

After the time of older Companion, even though the younger Companions continued the process of ijtihād yet this time of turmoil and internal conflicts caused the process to be substantially changed. The biggest change of the time of younger Companions (from 35 A.H. to 72 A.H.) in this regard was the shift of control over the ijtihād activities from the hands of government to private individuals. The process of this shift appears to have begun even in the early days of this period so that by the middle of that period it had already been completed. Ijtiḥād activities took place without the controlling involvement of government. This situation was caused by several factors, such as political disunity and conflicts, the leading personalities among the jurist-consuls being scattered around the far corners of the empire, and the establishment of teaching circles around them in different localities. However, this situation was mainly caused by the fact that most of the rulers of this time were not regarded as religiously competent by their contemporaries. Hence, the legislation and interpretation of a law which was centrally based on religion could not remain in their hands. The above situation with the absence of any central organisation among the jurists would have led the religious law towards diversity and contradiction. Different fatawā (legal judgements) were being issued by the different jurists and were being followed by individuals in different

localities. However, our study in the third chapter indicates that the factor which kept united the religious law even in such a situation and saved it from complete disintegration was the unanimity on the sources of ijtihād.

(17)

During the time of the younger Companions, 'Alī's decision to exempt al-hawāmil and al-'awāmil from zakātable livestock and his action once again exempting horses from the annual levy of zakāt can be accepted as ijtihādic decisions of a ruler. Likewise in the case of ṣadaqat al-fiṭr, Mu'āwiya's decision that an half ṣā' of wheat would be regarded as equal to the value of one ṣā' of dates or barley, must also be included among the ijtihādāt of the rulers of that time. Apart from them, the other significant issues relating to the then existing zakāt laws were the problem of zakāt on jewellery made from gold and silver and the problem of zakāt on orphan's property. These issues appear to have been privately discussed among the jurists of different regions, as different fatawā were being issued in this regard. However, a relatively more significant issue of that time was a question as to whether or not it was a religious obligation for a Muslim to hand over his zakāt in all circumstances to the rulers only and not directly to the beneficiaries of the zakāt fund. This question, in fact, emerged as a result of people's lack of confidence in the government. They were expressing their doubts about the spending of zakāt income by the government on the heads which had already been specified by the Qur'ān. Thus they were inclined to ask why they should not pay their zakāt amounts directly to the beneficiaries. Naturally, differing answers were presented by the jurists. Our study in the third chapter confirms

that since all of the above issues were being solved only through the private efforts of jurists, their varied decisions helped to impel legal development of zakāt law during that time towards diversity and contradiction.

(18)

With regard to the sources, (a) the Qur'ān, (b) the laws of the Prophet's time and his related statements, (c) the precedents of the period of older Companions and (d) the individual reasoning or personal judgement of jurist himself, can be included among the sources of ijtihādīc discussions during the time of the younger Companions. Similar to the preceding time, the first two sources must have held a binding force while the others could only be assumed as the secondary sources of ijtihād in this regard. The first mentioned source, the Qur'ān, having been compiled in a form of written book, could not have led to the major diversities. However, since the second source, the laws of the Prophet's time and his related statements, could not have been compiled like the Qur'ān, the only access to this source during that time, was through the Companions who had spread and settled in the different parts of the Land. The details of the Prophet's zakāt law and his related explanations were either preserved in their memories or parts of them might be traced in the manuscripts of the Prophet's letters that may still have been preserved by a few Companions. Anyway, the complete zakāt law of the Prophet's time with all its details could not be found in any one place or from one person. Instead, some details might be discovered from some Companions, while others would have to be traced from others. Moreover, some Companions might have had the knowledge of the early stages, while others would have had the details of the

later stages of the developing zakāt law of the Prophet's time. Therefore, it is quite understandable that the process of deduction and derivation from this source sometimes might have provided varied and contradictory results, instead of corresponding and agreed conclusions. Hence, this situation when added to other factors, like the political disunity, the lack of mutual consultation and the absence of any formal organisation among the jurists of that time, provided the sort of environment in which the law would tend to reveal instances of variation and diversion. The third mentioned source, namely the precedents of the period of older Companions, was not authoritative as were the first two sources, and there are a few examples of abandonment of old practices such as the re-exemption of horses from zakāt during the time of 'Alī, which rejected the practice of 'Umar and 'Uthmān in this regard. However, a growing trend towards giving priority to this source over the fourth source, namely the individual reasoning and personal judgement of jurists is confirmed by our study in the third chapter. The jurists were generally inclined to hold the stand that, instead of relying merely on their own personal opinions, if they could not get any indication from the first two sources, they must at least look for a precedent from the period of older Companions to support their views. This trend of turning back towards transmitted sources for every case even for a new problem and hesitating to find out a solution on the basis of reasoning and the observation of practicability of a particular legal decision, must have restricted the scope of ijtihādīc activity and would have placed obstacles in the way of its easy development. The reason why the ijtihādīc activity of the time

of younger Companions seems to have become frozen in comparison with the ijtihādīc efforts of the older Companions, lies in this fact.

(19)

After the period of younger Companions, individual circles of religious scholars remained as a major field for ijtihādīc/legislative activities during the whole period of the Successor Jurists (73 A.H. to 101 A.H.). Although the wide gulf that, during the preceding time, had emerged between the government and religious scholars, was now becoming gradually narrower, however, there is no reason to conclude that the ijtihādīc process had now regained the effective involvement of the government or the central leadership of the caliph as a religious authority. But, instead, the ijtihādīc/legislative activities of the Successors' time in general seems to have remained completely free from any effective participation by the government. An exception in this regard, however, can be given to the brief period of 'Umar b. 'Abd al-'Azīz, when most of the practical powers were actually transferred to the religious scholars or the jurists themselves. Only during this last part of the period, is there sufficient evidences of the involvement of the government and the leadership of the ruler as a religious authority.

(20)

In the sphere of zakāt law, the ijtihādīc development of the Successors' time can be traced in the following issues:

- (i) The theory of categorisation of wealth into the two different groups, namely, al-amwāl al-zāhira and al-amwāl al-bāṭina. The first was subject

to the government's collection of zakāt while the second was declared as subject to voluntary payment of zakāt, allowing the zakāt payer to hand over the zakāt directly to the beneficiaries.

- (ii) The influence of the above theory on the problem of zakāt on orphan's property.
- (iii) The theory that only that property is subject to annual levy of zakāt which is either productive by nature or has the quality of being productive; — ijtihādīc development of the Successor's time can be seen in the evolution of this theory and in its application in the cases of zakāt on jewellery, orphan's property, merchandise and al-māl al-dīmar.
- (iv) The theory of hawl (zakāt cycle). The elapse of one hawl was taken as an essential condition for the obligation of zakāt on a property. The evolution of this theory and its different interpretations applying to the different kind of properties, namely al-māshīya (livestock), al-'ayn (gold, silver and coins), and 'amwāl al-tijāra (merchandise).
- (v) The problems of charging zakāt on merchandise.
- (vi) The problem of zakāt for ma'ādin (mineral productions) and the rate of al-rikāz (buried treasures). In the case of ma'ādin, two different rates were being reportedly enforced during the time of 'Umar b. 'Abd al-'Azīz.
- (vii) The problem of zakāt on the extractions from sea. Two different rates were introduced for the items, ambergris and fish ('Umar b. 'Abdal-'Azīz's time).



- (viii) The exemption of horses and honey from zakāt ('Umar b. 'Abd al-'Azīz's time).
- (ix) The theory of al-māl al-dimār ('Umar b. 'Abd al-'Azīz's time).

The detailed study of all the above issues shows that in comparison to the preceding time, the ijtihādic/juristic activities of the Successor jurists not only flourished but also became more advanced and disciplined. The major factor in this regard was the improved political situation and more peaceful atmosphere of the time, that was not only more conducive to the juristic activities but also provided a greater opportunity for the mutual co-operation between the jurists of different regions. Moreover, the jurists of this time not only tried to solve newly emerging problems of that time but also attempted to reconcile the old controversial issues of the preceding time.

(21)

A specific ijtihādic development of the period of the Successor jurists was a growing trend towards evolving and formulating the general principles and the technical theories for the law as a whole and later applying them to the derivative details of the law. The example of these technical theories are the categorisation of wealth into the groups of al-amwāl al-zāhira (the known properties) and al-amwāl al-bāṭina (hidden properties) for the purpose of zakāt payment to the government and to determine the domain of voluntary payment, the doctrine of productivity of wealth as a basic condition for the obligation of zakāt on a certain property and the principle



that a hawl must have passed over the possession for the purpose of charging its annual zakāt. This trend of the jurists in fact, refined and systematized the process of expanding the law and hence made the law more uniform and balanced in respect of all its details and derivatives. However, the same trend of applying general theories and principles in the derivative details was also responsible for some of the technical complexities such as the difficulty in applying the theory of hawl in the cases of different incomes during the year.

There is good reason to assume that the above trend would have eventually directed the jurists to form or evolve the science of technical legal thought (uṣūl al-fiqh) for the whole structure of Islamic law and jurisprudence. Consequently the jurists, during the first half of the second century A.H., can be found moving along these lines. The science of uṣūl al-fiqh gradually evolved and later became an independent and separate part of Islamic legal science.

(22)

Our study and analysis of these general principles and technical theories of zakāt law confirm that in the course of their being formulised or evolved, the general instructions of the Qur'ān and the practical laws of the Prophet's time had been given a status of basic and major source for the zakāt law in general. However, it cannot be denied that the practices and the precedents of the early time (including both of the periods of older and younger Companions) were also given a significant importance and sometimes were regarded as a basic and fundamental source of the law. For example, the principle of hawl appears to have emerged from the same precedents. Nevertheless the process of legal criticism and analysis

gradually strengthen a trend among the jurists of the Successors' time, that only those precedents that belonged to the Prophet's time ought to be regarded as final and authoritative. Hence, in the case of contradiction between the early precedents of the Companions' time, the later development was being considered as invalid. This trend was acquiring strength from the mood of resurgence of the prophetic sunna that appears to be prevalent during the time of 'Umar b. 'Abd al-'Azīz.

(23)

The ijtihādīc development of the period of Successor jurists pertaining to zakāt law as a whole, illustrates the use of qiyās (though in a rudimentary form), the observation of maṣlaḥa (public benefit) and the regard for the general principle of justice in the process of legal interpretation, of its application to the law and its deduction from the specific sources.

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